

IN THE SUPREME COURT OF MISSOURI
SC 85451

STATE OF MISSOURI ex rel. THE DOE RUN RESOURCES CORPORATION, et al,
Relators

Vs.

THE HONORABLE MARGARET M. NEILL,
Presiding Judge, Twenty Second Judicial Circuit, City of St. Louis
Respondent

ON PETITION FOR WRIT OF PROHIBITION OR IN THE ALTERNATIVE, FOR
WRIT OF MANDAMUS
(transferred after opinion from the Eastern District Court of Appeals by order of this
Court)

SUBSTITUTE BRIEF OF THE RESPONDENT

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STATEMENT OF FACTS

I. PROCEDURAL POSTURE

This action is before the Court on a Motion To Transfer filed by Plaintiffs after the Eastern District Court of Appeals made its writ of prohibition peremptory in this matter. The underlying case asserts a claim for class action relief against a multitude of defendants, including Marvin Kaiser, the Chief Financial Officer (CFO) of Doe Run Resources Corporation.

The writ arose out of the trial court's denial of a motion to transfer venue or in the alternative, to dismiss. The basis for the motion was two-fold: (a) that the petition did not state a cause of action on its face against Marvin Kaiser, and (b) that even if the petition on its face stated a cause of action, the facts pleaded in the petition were not true.

In support of its motion to dismiss the defendants below (Relators here) filed with their motion the affidavit of Marvin Kaiser, Jeffrey Zelms, and others, related to the organization and management of Doe Run Resources Corporation. (See Relators' Tabs 9 – 13, Petition for Writ¹) To controvert those affidavits Plaintiffs filed numerous exhibits (Tab 15, Exhibits 1 -33) that created fact issues with respect to the affidavits advanced by the Defendants. Neither Judge Neill nor any party sought to invoke Rule 55.27(a), and notice was not served to convert the motion to one for summary judgment.

¹ . All citations to the record will be to the Tab used by Relators, and then individually to page or exhibit number.

On March 18, 2002 Respondent Neill overruled the motions to dismiss or transfer venue and Relators filed a writ of prohibition in the Eastern District. That writ was briefed and on May 20, 2003, the Eastern District issued its ruling, making the writ permanent. Respondent timely filed a motion to transfer to this Court, which was granted.

II. FACTS RELATED TO LIABILITY AND VENUE

A. Doe Run's History of Noncompliance With Air Quality Standards

This case arises out of Doe Run's operation of the largest remaining Lead Smelter in the United States, located in Herculaneum, Missouri. The emissions from that smelter include not only large amounts of particulate lead, but also arsenic and cadmium. As a result of these toxic emissions, Plaintiffs individually, and as class representatives, have brought claims for property damage. Plaintiffs not only seek to hold Doe Run Resources Corporation responsible for Plaintiffs' damages, but also seek compensation from certain officers and former employees, including its Chief Financial Officer, Marvin Kaiser. Kaiser is a resident of St. Louis City.

B. Defendant Kaiser's Residency In St. Louis City and His Role In The Management and Operation of Doe Run Are Undisputed

Defendants admit that Marvin Kaiser is a resident of the City of St. Louis at the time of filing and service of this case. (Relators Tab 9.J at ¶1.) Kaiser is and has been

Vice-President-Finance and Chief Financial Officer (hereafter, CFO) of the Doe Run Resources Company during the critical time periods at issue here. (Relators Tab 8, Plaintiff's Petition at ¶ 33, 34)

During Kaiser's tenure as CFO, Doe Run's Smelter effectively contaminated the entire class geographic area (which consists of about half of the community of Herculaneum), and resulted in 40% of the town's children having toxic blood lead levels (above federal government standards). (Id.)

Mr. Kaiser's role as CFO requires that he sign off on and approve "Authorizations For Expenditures" (hereafter, AFEs). (See Relators Tab 15; Plaintiffs' Exhibits 17, 18, 19, 22, 23, 24, 30 & 31) Kaiser's role in the budgeting and approval process requires that he approve purchasing decisions related to the plant and to the environmental systems. (Relators' Tab 9.J at ¶ 3). Mr. Kaiser, like many other CFOs, receives a salary. He also earns a yearly bonus based on meeting both individual and corporate objectives and achieving net worth appreciation of the Doe Run Company. (Id. at ¶4.b).

C. At the Time Defendant Kaiser Acted, He Knew of the Devastating Effects of Doe Run's Lead Emission.

As Chief Financial Officer and Executive Vice-President must be charged with actual or constructive knowledge of the inherent dangers of lead, arsenic and cadmium².

² Mr. Kaiser made representations to the state regarding financial costs of toxics cleanup. It is evident that one could not make predictions or estimations of financial

The amounts of lead Mr. Kaiser's company has released, as shown in the attached exhibits, are astronomical. As reported by Doe Run, over 278,000 pounds of lead³, 5,559 pounds of cadmium⁴, 38,413 pounds of zinc⁵ and 1,578 pounds of arsenic⁶ were released

costs related to clean-up and yet not know of the toxic natures of the chemicals that needed to be remediated. See Relators Tab 15, Plaintiff's Exhibits 26, 27, and 29).

³ Lead is a very toxic element, causing a variety of effects at low dose levels. Brain damage, kidney damage, and gastrointestinal distress are seen from acute (short-term) exposure to high levels of lead in humans. Chronic (long-term) exposure to lead in humans results in effects on the blood, central nervous system (CNS), blood pressure, kidneys, and Vitamin D metabolism. Children are particularly sensitive to the chronic effects of lead, with slowed cognitive development, reduced growth and other effects reported. The developing fetus is at particular risk from maternal lead exposure, with low birth weight and slowed postnatal neurobehavioral development noted. See EPA Air Toxics Website, <http://www.epa.gov/ttnatw01/hlthef/lead.html>

⁴ The acute (short-term) effects of cadmium in humans through inhalation exposure consist mainly of effects on the lung, such as pulmonary irritation. Chronic (long-term) inhalation or oral exposure to cadmium leads to a build-up of cadmium in the kidneys that can cause kidney disease. An association between cadmium exposure and an increased risk of lung cancer has been reported from human studies, but these studies are inconclusive due to confounding factors. Animal studies have demonstrated an increase in lung cancer from long-term inhalation exposure to cadmium. EPA has classified

cadmium as a Group B1, probable human carcinogen. See EPA Air Toxics Website, <http://www.epa.gov/ttnatw01/hlthef/cadmium.html>

⁵ Chronic Zinc exposure can cause anemia, pancreas damage, and lower levels of high density lipoprotein cholesterol (the good form of cholesterol). Breathing large amounts of zinc (as dust or fumes) can cause a specific short-term disease called metal fume fever.

⁶ Arsenic, a naturally occurring element, is found throughout the environment; for most people, food is the major source of exposure. Acute (short-term) high-level inhalation exposure to arsenic dust or fumes has resulted in gastrointestinal effects (nausea, diarrhea, abdominal pain); central and peripheral nervous system disorders have occurred in workers acutely exposed to inorganic arsenic. Chronic (long-term) inhalation exposure to inorganic arsenic in humans is associated with irritation of the skin and mucous membranes. Chronic oral exposure has resulted in gastrointestinal effects, anemia, peripheral neuropathy, skin lesions, hyperpigmentation, and liver or kidney damage in humans. Inorganic arsenic exposure in humans, by the inhalation route, has been shown to be strongly associated with lung cancer, while ingestion of inorganic arsenic in humans has been linked to a form of skin cancer and also to bladder, liver, and lung cancer. EPA has classified inorganic arsenic as a Group A, human carcinogen. See EPA Air Toxics Website, <http://www.epa.gov/ttn/atw/hlthef/arsenic.html>

from stacks and fugitive sources in 1999 alone. (See Tab 1)⁷. The Toxic Release Inventories for the Smelter indicate the following admitted amounts of lead releases from the smelter stack alone: (1) 1993-- 183,635 pounds; (2) 1994-- 184,522 pounds; (3) 1995-- 179,022 pounds; (4) 1996--179,620 pounds; (5) 1997 -- 186,680 pounds; (6) 1998 -- 179,380 pounds; and (7) 1999 -- 214,000 pounds. These releases all occurred during the time that Kaiser had the responsibility to approve and fund pollution abatement decisions, through the AFE process authorizing expenditures. (See Tab 15, Plaintiffs Exhibits 17-19, 22-24, and 30-31).

As a result of these emissions, Doe Run has not, in the 23 years after the federal government passed the Ambient Air Standard for lead in 1978, met the standard for lead in the air in Herculaneum at all of its air pollution monitors for an entire year⁸. (See Tab 15, Plaintiffs Exhibits 1-11). The area within the Herculaneum City limits, therefore, remains today a U.S. E.P.A. lead non-attainment area, as it has for the last 23 years. (Id.). As of 1999, Doe Run was the second largest source of lead emissions in the United States based on data Doe Run reports to the U.S. E.P.A. (Id.). Furthermore, the air monitors for the state of Missouri show a 10 to 100 fold greater exposure to lead for the class members and their properties above what other communities in Missouri are exposed. (Id.). Consequently, lead, cadmium and arsenic along with other toxic substances have

⁸. Doe Run has met the ambient air standard in 2003 and all but one quarter of 2002.

See <http://www.dnr.mo.gov/alpd/esp/aqm/dr4349.htm>

continued to contaminate the properties and homes of Herculaneum during Mr. Kaiser's tenure.

D. Doe Run Has Continued to Violate the Standard for Lead Emissions During Kaiser's Tenure.

During Mr. Kaiser's tenure with Doe Run, spanning more than eight years, Doe Run has continued to violate the air emissions standard for lead that was passed in 1978⁹. (Tab 15, Pl Ex. 1-6). At the Broad Street Monitor, Doe Run has violated the standard in *every quarter* of his tenure, except one through 2000¹⁰. (*Id.*). Even in 2001, Doe Run violated the standard for two additional monitors in the Class Geographic Area. (*Id.*). In 1992, a Doe Run blood lead study demonstrated that the average blood lead level for children in Herculaneum was 11 .6 Ug/dl which is above the CDC level of concern. (See Tab 15, Pl. Ex. 7). Further, this study demonstrated that neighboring communities had significantly lower average blood lead levels. (*Id.*)

Recent blood lead studies during Kaiser's tenure show that nearly one in four children tested in the City of Herculaneum suffers from lead poisoning, according to preliminary data released by the Missouri Department of Health. (Tab 15, Pl. Ex. 8, St. Louis Post Dispatch, "Data reveal lead levels in Herculaneum children," January 9, 2002). One hundred families were proposed to be relocated in 2002 because of the lead contamination. (Tab 15, Pl. Ex. 9, St. Louis Post Dispatch, "Cleaning up Herculaneum

⁹ . Except as noted in footnote 8, *supra*.

¹⁰ . Compliance has improved since 2000, see footnote 8.

may dislodge 100 families,” January 16, 2002).

E. Defendant Kaiser Had and Has Involvement in the Budgeting Process and the Pollution Control Budget that Included Purchase of Contaminated Properties.

1. KAISER ACTIVELY PARTICIPATES IN BUDGETING AND REVIEW OF EXPENDITURES FOR ENVIRONMENTAL MATTERS.

Doe Run admits that Kaiser is involved in the budgeting process at Doe Run. (Relators Tab 9.J, Kaiser affidavit at ¶5d). One of Kaiser’s roles is signing Authorizations For Expenditures (AFE) ensuring that expenditures are properly authorized, funded and accounted for. (Id. at ¶3). Mr. Kaiser was involved enough in the operation of the plant to be sent the “Lead Report” in July 1995 which among other things indicated that “Lead is rightly regarded as a chronic, cumulative toxin, capable of causing damage to several organs of the body as well as to the central nervous system.” (Tab 15, Pl. Ex. 29 at DR5 700620).

Contrary to Kaiser’s affidavit, Defendant Kaiser had involvement in the budgeting process that includes setting environmental goals for the smelter, and the pollution control budget that included purchase of contaminated properties. (Tab 8, Third Amended Petition, ¶33). For example, the 1994 Budget under which Kaiser operated during his first 12 months as Chief Financial Officer, stated as “Goals” for “Environment”: “Continue clean-up and remediation projects with emphasis on controlling dust.” (See Tab 15, Pl. Ex. 11 at DR6000920). For the Herculaneum

Smelting Division, the “Smelter Vision & Goals” included “Reduce Fence line air lead average... ,” “reduce air lead of historical stations . . . ,” “Meet the EPA ... air lead standards at each sampling station on a quarterly basis.” (Id. at DR 6000924)¹¹. Environmental issues were clearly part of the budgeting process in which Mr. Kaiser participated. (See Tab 15, Pl. Ex. 23, Baghouse Project). Doe Run has failed these goals during Mr. Kaiser’s tenure as Chief Financial Officer and Executive Vice President. Plaintiffs have alleged that the failure to meet these goals tied, at least in part, to the economics of purchasing proper abatement technologies which would have caused a reduction in Kaiser’s bonuses. (See Tab 8, Plaintiff’s Petition at ¶ 33, page 12)

2. KAISER HAD ACTUAL KNOWLEDGE OF THE ENVIRONMENTAL
IMPACT OF DOE RUN ON THE PROPERTY.

Plaintiffs have pleaded that Kaiser knew and understood the impact of Doe Run’s emissions on the Herculaneum Community. Plaintiffs have also produced evidence of this. Kaiser signed AFEs for projects reflecting this understanding. For example, he gave his required signature on “Purchase at 565 Reservoir Street” for “Plant Boundary Expansion - continuation of the property purchase program started six years ago to build a buffer zone around Smelter,” for purchases under the 1994 budget. (Tab 12, See also Tab 13.) (Same 316 School Street, 929 S. Main, 921/925 S Main, 958 Main and others).

He also approved expenditures to install asphalt so the street sweeper truck sweeping up lead would be more effective. (See Tab 14, DR 100 1472). He approved the

¹¹ The 1994 Budget is the only year of such documents Doe Run has produced.

“purchase of vacant lot at 965 South Main Street before someone builds a house on the lot,” recognizing the need to prevent more exposure to lead. (See Tab 15, DR1001 123).

3. KAISER PARTICIPATED IN DECISIONS TO CANCEL POLLUTION
CONTROL PROJECTS TO SAVE MONEY.

As a specific part of the budgeting process, Doe Run and Kaiser establish a pollution control budget. (See, Tab 15, Pl. Ex. 16, DR8002040). Kaiser, as part of the budgeting and approval of expenditures, was directly involved in the decision to spend and not spend certain money for pollution control equipment. Kaiser’s Affidavit says he never refused to approve AFEs. (Relators Tab 9.J, Kaiser affidavit at ¶3). Whether that is true, this only tells a part of the story. The budgets that Kaiser has been involved with demonstrate that certain pollution projects have been “canceled,” including “Property Purchases - ENV,” so that budgeted money would not be spent. (See Tab 15, Pl. Ex. 16, at DR8002041).

For example, in 1994 certain budgeted environmental projects as a Clean Air Station #1 for the Blast Furnace and replacement of the Sinter Plant Expansion Joint, replacing certain wiring and plant concrete were canceled. (Tab 15, Pl. Ex. 16, at 3, DR8002047). The inference from the fact of these cancellations is that environmental projects, although approved, were not thereafter funded, and as CFO Mr. Kaiser was instrumental in that decision.

The 1995 Budget included more purchases of property, including 565 Reservoir Road, and a project that involved ventilating the top of the sinter building, purchasing a

sweeper truck for the yard to keep dust down, purchase of goretex bags, certain pollution control bag houses but not others. Each of these budgeted issues was an environmental project. (Tab 15, Pl. Ex. 16, at DR8002042-43). However, in 1995 a purchase of 937 Main Street was canceled. (Id.) The 1996 Budget contained expenditures for additional purchases of private properties. (Tab 15, Pl. Ex. 16, 929, 921/925, 978, 915 South Main).

On January 8, 1997, Kaiser approved a project which was described as “Install new weather tower . . . Both the State of Missouri and Region VII EPA has determined that a new weather tower located east of the plant was required to adequately develop a new Lead SIP for Herculaneum.” (See Tab 15, Pl. Ex. 17, DR1001199). The SIP is the state required pollution control plan required for the plant to operate. The “Purpose” section of this AFE signed by Kaiser notes: “\$11,000 will be deleted from the money budget for plant paving.” (Id.) In December 1996, just a month before, Kaiser had approved expenditure for “Install concrete and asphalt paving in the plant. (Tab 15, Pl. Ex. 18, DR1001 195). “Plant paving is an important part of facility maintenance and must be replaced and improved to assist control of lead dust emissions.”

Kaiser was aware no later than 1996 that dumping and reloading trucks generated fugitive lead dust emissions, and that truck traffic in the plant created dust. Kaiser participated in a tradeoff of resources, e.g., taking money out of paving which would have reduced lead emissions to the community, and using it toward building a weather tower so smelter operation could be maintained, without attempting to “adequately fund” the paving project known to him to have pollution control benefits. Using budgeted resources directed at one pollution control problem (and thereby decreasing the

effectiveness of that abatement strategy), so as not to incur a non-budgeted expense (thereby decreasing liabilities and increasing net worth) is indicative of Kaiser's direct participation in pollution control and abatement, and demonstrates a trade-off of resources affecting, at least in part, Kaiser's bonuses. (Tab 9.J., Kaiser Affidavit, ¶4b).

As another example, Kaiser approved a project described as "Modify existing cooler baghouse [air pollution control equipment] in the Sinter Plant so that bag maintenance can be done without shutting down the plant." (Tab 15, Pl. Ex. 19, DR 1001181). The description further states: "This **unbudgeted** project will be funded by **reduced spending on budgeted** property purchases." (Id.) (emphasis added).

Kaiser therefore participated in a decision to keep the plant producing rather than increase the buffer zone around the plant for the safety of the community by funding property purchases which had already been budgeted. Separately, Kaiser participated in the decision to do soil replacement on certain properties and not others within the Class Geographic Areas. (See Tab 15, Pl. Ex. 20, Soil Replacement Project 1995; Pl. Ex. 21, Soil Replacement Project 1996 at DR12100941). Again, the property remediation was not adequately funded and was delayed by the lack of that funding. Kaiser specifically authorized this reduction of expenditures, participating in Doe Run's breach of statutory and common law duties of protecting property owners and residents in the class from Doe Run's pollution.

While acting in this budgeting and approval capacity, Kaiser had knowledge of the emission problems at the Doe Run Smelter and the need to control them. In November 1994, Kaiser approved a Project: "Phase I: Design and cost a ventilation system for the

process gasses from the existing dross reverbaratory furnaces to a new baghouse filter...” (Tab 15, Pl. Ex. 22 at DR1001117). The purpose noted, “This new ventilation system will vent either of the operating reverb furnaces to a separate baghouse. This will greatly improve furnace control and emissions that are currently a significant problem.” (Id.) (emphasis added).

Contrary to Relator’s Brief, this project was set for completion in March 1995. (Id.) Yet it was not until January 1996 that Kaiser approved the follow up Project: “Purchase and install the baghouse filter system designed in Phase I,” to be completed over a year later. (Tab 15, Pl. Ex. 23, DR1001121). The purpose of the expenditure was to “...greatly improv[e] furnace control and lower emissions that currently are a significant problem.” (Id.) (emphasis added). The AFE notes “the following adjustments will be made to the 1996 capital budget to stay within approved guidelines. . .” and “Completion within six months, July 1996.” (Id.) The delay in the completion of these pollution controls, and failure to make these improvements earlier, and the need to stay within “approved guidelines” are demonstrative of the role Kaiser played in participating in the activity that led to Doe Run’s tortious conduct. His participation in tortious acts included the failure to timely and fully fund pollution control expenditures.

In August 1996, Mr. Kaiser authorized the expenditure of a “tuyere air control system.” (Tab 15, Pl. Ex. 24 at DR100I 178). The “Purpose” section for this expenditure notes that the implementation of this air control at Doe Run’s Buick Recycling Facility resulted in more production and “fewer hot furnace tops which impact ambient air emissions.” (Id.) Also, the AFE notes that only one, not both of the furnaces, would be

fitted with this system. (Id.) The inference to be drawn from these AFEs is that Kaiser is the budgeting for expenditures at Doe Run's Buick facility (giving preference on the basis of production and profit), before he is budgeting for the Herculaneum Smelter. Kaiser participated in funding pollution controls at one rather than both furnaces at Herculaneum.

At the same time Mr. Kaiser cut funding for authorized and planned plant paving (Tab 15, Pl. Ex. 17), he authorized \$1,600,000 to rebuild the Number 1 blast furnace "... to achieve future planned production levels." (Tab 15, Pl. Ex. 30 DR1001460). Kaiser was aware that blast furnace roof monitors were an emissions source historically difficult to manage. Doe Run thereafter continued to violate air pollution standards. (Tab 15, Pl. Ex. 31, DR1001189).

Further, that Kaiser was responsible for demonstrating financial assurance to the state indicates that he understood Doe Run's environmental obligations to the state and took part in attempting to comply with them. (See, e.g., Tab 15, Pl. Ex. 25, 1995 Financial Assurance, and Pl. Ex. 26, 1996 Financial Assurance). Mr. Kaiser was also involved in handling the financing of lead clean-up obligations. At the Herculaneum Communications Team Meeting on August 11, 1994, Mr. Kaiser is noted as setting up a "limited liability" on the opening books, with Mr. Zelms confirming that the Herculaneum soil cleanups were to come out of the "old Lead Belt" money pool. (Tab 15, Pl. Ex. 28, at DR5700658).

F. Defendant Kaiser Makes Representations to the Public Regarding Doe Run's Financial Status and Ability to Comply With Environmental Laws.

More recently, on February 15, 2002, Kaiser stated that Doe Run's financial crunch should not have an impact on the company's clean up of environmental problems, which include addressing lead contamination problems in Herculaneum. (Tab 15, Pl. Ex. 26, St. Louis Post Dispatch, February 15, 2002, "Doe Run debt woes shouldn't affect cleanup"). "There is a lot of public pressure, but we are in compliance" with all environmental laws, he said¹². (Id.) The "sour economy," not the "environmental issues at the smelter in Herculaneum," is a major factor in Doe Run's financial squeeze, according to Kaiser. (Id.) The logical inference from these media statements is that Kaiser is in a position within the company both to know and to represent to the public the status of Doe Run's environmental compliance with pollution laws. He is also in a position to know Doe Run's financial status and how that relates to its ability to clean up contamination in Herculaneum.

G. The Dixon Matter is Irrelevant to the Court's Determination Here.

Relators brief discusses a prior case, Dixon v. Doe Run, et al., filed in the Circuit

¹² As shown by the Toxic Release Inventory, (Tab 15, Pl. Ex. 1-10) Doe Run is **not** in environmental compliance; Kaiser's statements to the media were false.

Court of Jefferson County. That case has no relevance to the argument here¹³. This is not the same case as Dixon because:

(1) The Jefferson County action sought certification for several types of property, while this action seeks certification of only residential property owners;

(2) This action includes five Plaintiffs who were not in the Jefferson County action;

(3) The Jefferson County action also sought certification of a medical monitoring class while this one does not;

(4) There are corporate and individual defendants in this action that were not parties to the Jefferson County action; and

(5) This case is divided into subclasses presenting a different analysis for the Court.

In addition, new facts have come to light since the Jefferson County case was dismissed, including the impact of Mr. Kaiser's participation in the tortious acts¹⁴.

Doe Run has acknowledged, in a Consent Order with the United States Environmental Protection Agency (EPA), that the average concentration of lead levels in

¹³ . Similarly the additional cases noted at Footnote 3, of Relators' Statement of Facts are not before this Court and are irrelevant to the issues presented for resolution.

¹⁴ . If Plaintiffs had known of Kaiser's participation and location of residence at the time the Dixon suit was filed, he would have been named and the case would have been filed in St. Louis City originally.

residential soils within one quarter mile of the smelter is 3,014 ppm, compared to natural background levels of lead in soils outside the influence of the smelter of 25 to 40 ppm. (See Tab 33 at 10-14)

The EPA concluded that the presence of hazardous substances at the facility and the past, present or potential migration of hazardous substances from the facility constitute actual and/or threatened “releases” of hazardous substances as defined as Section 101(22) of CERCLA 42 U.S.C. §9601(22) and Section 260.500(9) R.S.Mo. (H.) The EPA concluded that conditions present at the facility may present an imminent and substantial endangerment to public health. (Id.) The EPA concluded that there is actual or potential exposure to nearby human populations for hazardous substances or pollutants or contaminants, and that this factor is present at the facility due to the concentrations of lead in the soil of residences near the community. (Id.)

The EPA also concluded that a significant source for the lead in soils is the historic airborne releases of lead particles from the Herculaneum smelter. (Id.) In addition, the EPA has now determined that over 40% of the children within the Class Geographic Area of Plaintiffs’ Petition have elevated levels of lead. These facts not only distinguish Dixon from the present case, but also highlight the impact of Mr. Kaiser’s participation in tortious acts during his tenure with Doe Run Resources Company.

POINTS RELIED ON

I. A WRIT OF PROHIBITION WILL NOT LIE IN THIS CASE BECAUSE PLAINTIFFS' PETITION ADEQUATELY PLEADED A CAUSE OF ACTION AGAINST DEFENDANT KAISER IN THAT PLAINTIFFS PLEADED THAT DEFENDANT KAISER HAD KNOWLEDGE OF AND PARTICIPATED IN AN ACTIONABLE WRONG, THAT IS, PARTICIPATED IN DOE RUN'S COMMISSION OF NEGLIGENCE PER SE, A TRESPASS, A PRIVATE NUISANCE, AND/OR A STRICT LIABILITY TORT AGAINST PLAINTIFFS AND OTHERS RESIDENTS IN THE CLASS GEOGRAPHIC AREA.

Derfelt v. Yokum, 692 S.W.2d 300, 301 (Mo. banc 1985)

State ex rel. Malone v. Mummert, 889 S.W.2d 822, 825 (Mo. banc 1985)

Curlee v. Donaldson, 233 S.W.2d 746 (Mo. App. 1950)

Robinson v. Moark-Nemo Consol. Min. Co., 163 S.W. 885 (Mo. App. 1914)

II. VENUE IN THE CITY OF ST LOUIS IS PROPER AND NOT PRETENSIVE BECAUSE BY THE FACTS KNOWN TO PLAINTIFFS AT THE TIME THE CASE WAS FILED SUPPORTED A REASONABLE LEGAL OPINION THAT A CASE COULD BE MADE AGAINST MARVIN K. KAISER. FURTHER, THE FACTS SET OUT IN MR. KAISER'S AFFIDAVIT ARE THEMSELVES CONTROVERTED AND PROVIDE NO BASIS FOR A JUDICIAL DETERMINATION THAT JOINDER OF MR. KAISER WAS PRETENSIVE.

Bottger v. Cheek, 815 S.W.2d 76, 80 (Mo.App.1991)

State ex rel. Toastmaster v. Mummert, 857 S.W.2d 869 (Mo. App. E.D. 1993)

State ex rel. Shelton v. Mummert, 879 S.W.2d 525 (Mo. banc 1994)

State ex rel. Malone v. Mummert, 889 S.W.2d 822, 825 (Mo. banc 1985)

ARGUMENT

I. A WRIT OF PROHIBITION WILL NOT LIE IN THIS CASE BECAUSE PLAINTIFFS' PETITION ADEQUATELY PLEADED A CAUSE OF ACTION AGAINST DEFENDANT KAISER IN THAT PLAINTIFFS PLEADED THAT DEFENDANT KAISER HAD KNOWLEDGE OF AND PARTICIPATED IN AN ACTIONABLE WRONG, THAT IS, PARTICIPATED IN DOE RUN'S COMMISSION OF NEGLIGENCE PER SE, A TRESPASS, A PRIVATE NUISANCE, AND/OR A STRICT LIABILITY TORT AGAINST PLAINTIFFS AND OTHERS RESIDENTS IN THE CLASS GEOGRAPHIC AREA.

The Relators assert that the joinder of Marvin Kaiser, a resident of the City of St. Louis and the Chief Financial Officer of Doe Run Resources Corporation, as a defendant was a pretense designed for the sole purpose of obtaining venue in the City of St. Louis. Plaintiffs in the action below do want venue in the City. Had Plaintiffs known that Kaiser was present in the City, their initial action would have been filed there. There is no dispute but that venue is proper in the City of St. Louis under *Malone*, because Plaintiffs have stated a cause of action against Mr. Kaiser.

A. STANDARD OF REVIEW

Prohibition

This Court granted transfer to determine whether the Court of Appeals Eastern District properly made its writ of prohibition absolute. The writ prohibits the Circuit

Court of the City of St. Louis from taking any further action because, according to the Court of Appeals, venue is not proper in the City of St. Louis as a result of the pretensive joinder of Marvin Kaiser as a defendant in this action.

Whether a writ should issue is purely a legal question. This is because prohibition considers whether the lower court has jurisdiction to act at all. Review by this Court of a purely legal question is *de novo*. **Blakely v. Blakely**, 83 S.W.3d 537, 540 (Mo. banc 2000).

The essential function of prohibition is to correct or prevent inferior courts and agencies from acting without or in excess of their jurisdiction. **State ex rel Douglas Toyota III, Inc., v. Keeter**, 804 S.W.2d 750, 751 (Mo. banc 1991); **State ex rel. McDonnell Douglas Corp. v. Gaertner**, 601 S.W.2d 295, 296 (Mo.App.1980).

A writ of prohibition does not issue as a matter of right. **Derfelt v. Yokum**, 692 S.W.2d 300, 301 (Mo. banc 1985); **State ex rel. Hannah v. Seier**, 654 S.W.2d 894, 895 (Mo. banc 1983). Prohibition cannot be used as a substitute for an appeal or to undo erroneous judicial proceedings that have already been accomplished. **State ex rel. Boll v. Weinstein**, 295 S.W.2d 62, 67 (Mo. banc 1956). One court should not substitute its judgment or discretion for that of another court properly vested with jurisdiction and exercising its discretion within the legitimate boundaries of that jurisdiction. **State ex rel Douglas Toyota III**, 804 S.W.2d at 751. Prohibition is, therefore, not intended as a substitute for correction of alleged or anticipated judicial errors and it cannot be used to adjudicate grievances that may be adequately redressed in the ordinary course of judicial

proceedings. *Knisley v. State*, 448 S.W.2d 890, 892 (Mo.1970).

A writ of prohibition should be issued only judiciously and with great restraint. *Derfelt*, 692 S.W.2d at 301. A writ of prohibition is proper only when the facts and circumstances of the particular case demonstrate “unequivocally” that there exists an extreme necessity for preventive action. *Id.* (Emphasis added). Absent such conditions, the court should decline to act. *Id.*

Pretensive Joinder

Under *State ex rel. Malone v. Mummert*, 889 S.W.2d 822, 825 (Mo. banc 1985) there are two tests to determine whether joinder is pretensive. This Point addresses only the first test – “whether, after reasonable inquiry of the law under the circumstances, plaintiffs have put forward a claim either under existing law, under a non-frivolous argument for the extension, modification or reversal of existing law, or under a non-frivolous argument for the establishment of new law.” *Id.* at 825. “The standard for determining [pretensive joinder] ... is less stringent than that required either to grant summary judgment or to sustain a motion to dismiss for failure to state a claim.” *Id.* at 825.

Relators call attention in their brief to the other cases involving similar facts filed in the City of St. Louis. (See Statement of Facts, Footnote 3, page 12). Those cases are not properly before this Court. This case deals with a particular petition, and this point deals only with the face of that particular petition.

Point II addresses the second prong of the *Malone* test.

B. INTRODUCTION

Section 508.010(3) RSMo (2002) gives plaintiffs a presumptive right to bring this action in the City of St. Louis. Plaintiffs have a right to choose the venue in which they will prosecute their action. See, *Willman v. McMillan*, 779 S.W.2d 583, 586 (Mo. banc 1989)(“Where the legislature has provided that venue is proper in a particular county, it is not the court's role to frustrate it ...”). Only if plaintiffs have tried to create venue where the statute would not allow – that is joined defendant Marvin Kaiser, a City of St. Louis resident, as a pretense – may this Court abrogate the Plaintiffs’ right to choose St. Louis City as the venue for this action.

Relators, in order to illustrate their claims of perceived pretense, focus the majority of their argument on paragraphs 34 and 35 of Plaintiffs’ Third Amended Petition. Whether a cause of action is stated against Mr. Kaiser cannot be determined solely from paragraphs 34 and 35 of the Third Amended Petition. Analysis of those facts must be made in the context of the specific causes of action pleaded against Mr. Kaiser. The Court of Appeals failed to make such an analysis.

Specifically, Plaintiffs Third Amended Petition pleads causes of action in strict liability (Count II), private nuisance (Count III); and trespass (Count IV). These causes of action are all liability-without-fault causes of action and assume a duty owed the plaintiffs if there is injury to their property.

- Under trespass theory if Mr. Kaiser merely aided the corporation in its decision to permit Doe Run to fail to fund necessary pollution abatement, he is personally

liable for trespass. *Dyer v. Tyrell*, 127 S.W.114, 117 (Mo. App. 1910). Accord, *Curlee v. Donaldson*, 233 S.W.2d 746 (Mo. App. 1950).

- As to nuisance, a defendant's negligence, intention, design or motive are "immaterial to his liability for nuisance." *Frank v. Environmental Sanitation Management, Inc.*, 687 S.W.2d 876, 880 fn 3 (Mo. banc 1985). "When we look at the nature of most of the private nuisances spoken of in the books, we cannot fail to perceive the propriety of allowing a recovery upon the mere proof of the existence of the nuisance." *Smiths v. McConathy*, 11 Mo. 517, 523 (1848). If Kaiser knew of and participated in the creation of a private nuisance, he is personally liable for the corporations' wrongful act in so doing.
- Strict liability, as its name implies, means "liability that is imposed on an actor *apart from* either (1) intent to interfere without a legal justification for doing so, or (2) *breach of a duty* to exercise reasonable care...." Keeton, et al, PROSSER AND KEETON ON TORTS (5th ed.) § 75 (emphasis added). If Mr. Kaiser had knowledge of and participated in decision that led (no pun intended) Doe Run to commit acts for which the corporation is strictly liable, Mr. Kaiser is likewise strictly liable.
- Only Count I sounds in negligence and it includes a negligence per se claim. Negligence per se "is negligence as a matter of law: The legislature pronounces in statute what the conduct of a reasonable person must be...." *Monteer v. Prospectors Lounge, Inc.*, 821 S.W.2d 898, 900 (Mo. App. W.D. 1992).

Despite these causes of action that presume duty when there is injury to the

Plaintiffs and those within the Class Geographic Area, the Court of Appeals’ opinion concludes that Mr. Kaiser’s only “duty runs to the corporation and its shareholders.” *State of Missouri ex rel. Doe Run Resources Corp.*, (ED81573)(slip op. at 8)(transfer granted). This is an incorrect statement of the law.

C. PLAINTIFFS HAVE PLEADED A CAUSE OF ACTION UNDER PRONG I OF THE MALONE TEST BECAUSE PLAINTIFFS HAVE PLEADED THAT KAISER HAD ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF AND PARTICIPATED IN AN ACTIONABLE WRONG.

In their first point, Relators contend that Plaintiffs pretensively joined Kaiser as a defendant because, they argue, his actions were taken in a corporate capacity rather than in an individual capacity, and that Kaiser’s actions, as alleged on the face of the Third Amended Petition, do not rise to the level of active participation in a tort of the corporation.

The standard of review applicable to Point I limits this Court to a review of the face of the pleadings. This is important in the context of Point I because the Court may not consider the prior action filed in Jefferson County, or the affidavits challenging the truth of the allegations set forth in the petition¹⁵. This Court is limited to a test solely of the adequacy of the petition. *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306

¹⁵ As will be shown in Point II, this Court may not consider the affidavits in this matter at all because the trial Court did not consider the affidavits. See Point II, *infra*.

(Mo. banc 1993). Even though the test under a pretensive joinder rubric is less stringent than the test applied for a motion to dismiss, *Malone*, 889 S.W.2d at 825, “[w]hen reviewing dismissal of a petition, a court allows a pleading its broadest intendment, treats all facts alleged as true, construes allegations favorably to plaintiff and determines whether averments invoke principles of substantive law entitling plaintiff to relief.” *Bachtel v. Miller County Nursing Home Dist.*, 110 S.W.3d 799, 801 (Mo. banc 2003).

Plaintiffs’ Third Amended Petition states in part:

33. Defendant Marvin K. Kaiser is an officer of Defendant Doe Run Resources Corporation. At all times Defendant Kaiser was acting jointly and in conspiracy with the other defendants and other unnamed co-conspirators. Defendant Kaiser had and has an economic motive and personally benefitted [sic] from the conspiracy....

34. During times relevant herein Defendant Kaiser was and is Vice President and Chief Financial Officer for the Doe Run Resources Corporation and the Doe Run Company. As an officer of Doe Run, Defendant Kaiser, is liable to Plaintiffs and the Plaintiff Class because he had actual or constructive knowledge of Doe Run’s wrongful conduct and participated in it; this liability is in addition to and independent of any liability based on conspiracy....

Plaintiffs’ Third Amended Petition at 11-12 (emphasis added). The wrongful conduct in which Mr. Kaiser is alleged to have participated includes the liability-without-fault torts pleaded in the Counts of the Third Amended Petition – creation of a private nuisance, strict/absolute liability, trespass and negligence per se.

**1. CORPORATE OFFICERS ARE LIABLE FOR CORPORATE ACTS
WHEN THEY HAVE KNOWLEDGE OF AND PARTICIPATE IN
CORPORATE TORTS.**

The Court of Appeals read these pleadings and concluded that “the very nature of the actions Mr. Kaiser is alleged to have taken is such that that they could only be undertaken in Mr. Kaiser’s official capacity as the Chief Financial Officer of Doe Run and not in an individual capacity.” (Slip op. at 6). The Court of Appeals also concluded that Plaintiffs had not made a claim against Mr. Kaiser because ‘Plaintiffs specifically alleged that all of Mr. Kaiser’s actions were undertaken within the course and scope of his employment and agency. This is fatal to any claim that Mr. Kaiser is liable in his individual capacity.’ (Slip Op. at 6).

Not putting too fine a point on it – this statement of the Court of Appeals is simply incorrect under the law of Missouri.

The law is properly concerned that a corporate officer not face individual vicarious liability. This is meaning of the rule to which the Court of Appeals attaches such import – that “merely holding a corporate office will not subject one to personal liability for the misdeeds of the corporation.” *Lynch v. Banke Baer & Bowery Krimko*,

Inc., 901 S.W.2d 147, 153 (Mo. App. E.D. 1995)(Slip op. at 6). Of course, this is true as far as it goes. It fails, however to consider a clear and uninterrupted line of cases running from at least 1911 that subject a corporate officer to personal liability when the corporate officer participates in corporate wrongdoing.

**2. PARTICIPATION IN, NOT CONTROL OVER, A CORPORATE TORT,
IS THE BASIS FOR PERSONAL LIABILITY OF CORPORATE OFFICER.**

Where the corporate officer commits the act him or herself, the liability is not vicarious but personal. For this reason, the proper question is not (as the Court of Appeals asked) whether Mr. Kaiser acted as a corporate officer or as an individual. Instead, the proper question is whether Mr. Kaiser is individually liable for acts he personally committed as a corporate officer. Under Missouri law, “corporate officers may be held individually liable for *tortious corporate conduct* if they have actual or constructive knowledge of, and participated in an actionable wrong.” *Lynch* 901 S.W.2d at 153 (italics in original)(emphasis added) citing *Boyd v. Wimes*, 664 S.W.2d 596, 598 (Mo. App. 1984).

The language of ¶ 34 of the Third Amended Petition uses the exact words found in *Lynch* and *Boyd*. If the facts as pleaded are assumed true (as they must be for purposes of such a motion) and the pleadings are given their broadest intendment, with all allegations construed in favor of claimant, *Bachtel*, 110 S.W.3d at 801, the Plaintiffs have pleaded a claim against Kaiser for personal liability cognizable under Missouri law sufficient to withstand a motion to dismiss.

The policy of the common law of Missouri recited in **Boyd** and **Lynch** recognizes that a refusal to permit individual, personal liability for corporate officers who have knowledge of wrongs committed by the corporation and who participate in those wrongs would improperly shield corporate agents from liability for wrongs committed.

[T]he corporate office does not insulate against liability one who has actual or constructive knowledge of the actionable wrong and who participates therein. **Osterberger v. Hites Construction Co.**, 599 S.W.2d 221, 229 (Mo.App.1980). As pointed out in **Rauch v. Brunswig**, 155 Mo.App. 367, 137 S.W. 67 (1911), were the rule to the contrary, "the agent of a corporation could shield himself from liability for almost every kind of wrong, provided he was acting in the capacity of agent ... [T]he agent is liable to a third party for misfeasance and for acts of positive wrong." 137 S.W. at 68.

Boyd, 664 S.W.2d at 598. Accord, **Robinson v. Moark-Nemo Consol. Min. Co.**, 163 S.W. 885 (Mo. App. 1914)("To permit an agent of a corporation, in carrying on its business, to inflict wrong and injuries upon others, and then shield himself from liability behind his vicarious character, would often both sanction and encourage the perpetration of flagrant and wanton injuries by agents of insolvent and irresponsible corporations" (citation omitted)) and **Tedrow v. Deskin**, 290 A.2d 790, 803 (Md. App. 1972)("to make an officer of a corporation liable for the negligence of the corporation there must have

been upon his part such a breach of duty as contributed to, or helped to bring about, the injury; he must have been a participant in the wrongful act”).

Relators here, and the Court of Appeals in its opinion, relied on *Lynch*. *Lynch* is a failure to plead case and, for that reason, offers no support to either the Court of Appeals opinion or Relator’s position because Plaintiffs here pleaded that Kaiser participated in the wrongful conduct.

Lynch involved a wrongful termination claim. The court cited *Boyd* for the proposition that a corporate officer may be individually liable when he has knowledge and actively participates in an actionable wrong, but concluded that the plaintiff failed to plead himself into Court. “There are no allegations that Bryant individually participated in the wrongful discharge.” *Id.* at 154 (Emphasis added). It was the failure to plead participation that doomed the plaintiff’s claim in *Boyd*, not a lack of liability as a matter of law.

Here, Plaintiffs pleaded individual liability, expressly stating that Kaiser “participated” in the wrongful acts pleaded in Counts I-IV. “Defendant Kaiser, is liable to Plaintiffs and the Plaintiff Class because he had actual or constructive knowledge of Doe Run’s wrongful conduct and participated in it...” Third Amended Petition at ¶ 34. The pleading flaw upon which *Lynch* turned is not present here. Under *Lynch*, if the plaintiff had simply pleaded that the corporate officer had participated in the claimed wrongful discharge, the petition would not have been dismissed. Because *Lynch* turns on

pleadings, not application of the law of corporate officer liability, **Lynch** does not defeat Plaintiffs claim; it supports that claim.

The Court of Appeals apparently believes that individual liability exists only if the corporate officer commits an act as an individual apart from his or her corporate duties. No case supports this conclusion. Rather, the cases reach the opposite holding. Missouri law holds that corporate officers acting within the course and scope of their employment are individually liable to third parties outside the corporation for wrongful acts when they have knowledge of and participate in the wrongful acts of the corporation. **Lynch; Boyd; Osterberger v. Hites Const. Co.**, 599 S.W.2d 221, 229 (Mo. App. 1980).

This is hornbook law.

Officers and directors may be held individually liable for personal participation in tortious acts even though they derived no personal benefit, but acted on behalf, and in the name of, the corporation, and the corporation alone was enriched by the acts.

3A William M. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 1137 (rev.perm. ed.1994). The rule is as well accepted nationally as it is reflected in Missouri law. “The general, if not universal rule is that an officer of a corporation who takes part in the commission of a tort by the corporation is personally liable therefor.” **Wicks v. Milzoco Builders, Inc.**, 470 A.2d 86, 90 (Pa. 1983)(emphasis added).

the general rule is that corporate officers or agents are personally liable for those torts which they personally commit, or which they inspire or

participate in, even though performed in the name of an artificial body.

Fletcher v. Western Nat. Life Ins. Co., 10 Cal.App.3d 376, 89 Cal.Rptr. 78 (1970); **Miller v. Simon**, 100 Ill.App.2d 6, 241 N.E.2d 697 (1968); **Pacific & Atlantic Shippers, Inc. v. Schier**, 109 N.H. 551, 258 A.2d 351 (1969); **McGlynn v. Schultz**, 95 N.J.Super. 412, 231 A.2d 386 (1967); **Faulk v. Milton**, 25 A.D.2d 314, 268 N.Y.S.2d 844 (1966)....

Tedrow, 290 A.2d at 802. Accord, (not exhaustive but only illustrative listing) **Huffman v. Poore**, 569 N.W.2d 549, 558 (Neb. App. 1997); **Loeffler v. McShane**, 529 A.2d 876, 878 (Pa. Sup. 1988); **Haupt v. Miller**, 514 N.W.2d 905, 909 (Iowa 1994).

The essence of the participation theory is that a corporate officer can be held personally liable for a tort committed by the corporation when he or she is sufficiently involved in the commission of the tort. That is what Missouri law holds. That is what Plaintiffs pleaded.

Participation is an ultimate fact. It means that Kaiser sufficiently participated in the commission of the torts alleged in the Third Amended Petition to be liable for the corporation's conduct. Participation means that Kaiser took sufficient part in – inspired, encouraged, contribute to, helped bring about – the wrongful acts to be liable under Missouri law.

Relators argue and the Court of Appeals concluded that control is *sine qua non* of corporate officer liability. While control is one form of participation, a corporate officer need not control the corporation or its employees to participate in the commission of the

tort. *Curlee v. Donaldson*, 233 S.W.2d 746, 753 (Mo. App. 1950) described the holding in *Dyer v. Tyrell*, 127 S.W.114, 117 (Mo. App. 1910) as follows:

Tyrell was held liable as an aider and abettor to a trespass involving timber cutting *where he had nothing whatsoever to do with the operation*, and where his only connection with the case was his signature to the contract for the purchase of timber, merely as a surety for the actual timber purchasers, and the fact that he sold supplies to the timber cutters, which supplies were paid for out of proceeds of the sale of the timber.

Curlee, 233 S.W.2d at 753 (Emphasis added).

Curlee extended *Dyer* to those cases in which an element of control was also present. In *Curlee*, the president of a corporation authorized his workers to cut trees on land where they had no permission to do so. The plaintiff sued the corporate entity as well as the president, Donaldson. Donaldson claimed he had no knowledge of the tree cutting, and deferred tree-cutting decisions to his foreman. *Id.* at 749-750. He claimed he had instructed his employees where to cut, and to be mindful of the line separating the properties. He did not physically go out and supervise the cutting. *Id.* After reviewing the evidence the Court imposed liability on Donaldson because “[i]n trespass principals, as well as agents, are joint trespassers and the principal is liable for the acts of the agent performed within the line of his duty, whether the particular act was or was not directly authorized. *Humbser v. Scott*, 5 Mo. App. 507 [597]; *Dowell v. Taylor*, 2 Mo. App. [329] 334; *Murphy v. Wilson*, 44 Mo. 313.” *Curlee*, 233 S.W.2d at 752-53. Further, “[o]ur

conclusion from the evidence in this case is that defendant James W. Donaldson is individually liable for the trespasses on the ground that he aided, abetted and encouraged their commission.” *Id.* at 753.

Aiding and abetting, not control, supplied the necessary participation in the wrongful act to justify Donaldson’s individual liability for corporate acts.

Nevertheless, Relators attempt to turn the “participation” test into a control test. They argue that once the *Curlee* foreman left Donaldson’s employment, the tree cutters were working for Donaldson. At that point Donaldson exercised control over the project and that, according to the Relators, is the reason Donaldson faced individual liability for his corporate acts.

A careful reading of *Curlee*, however, shows the holding is based on the fact that Donaldson merely participated – that is, he “aided, abetted and encouraged,” those who actually cut the trees. Donaldson himself did not cut the trees, nor did he direct the tree cutters to cut the trees that constituted the trespass.

The rule is well established that 'one who aids, abets, assists, or advises the trespasser in committing a trespass, is equally as liable as the one who does the act, himself.' *Cooper v. Massachusetts Bonding & Ins. Co.*, 239 Mo.App. 67, 186 S.W.2d 549, 551; *Broyles v. Pioneer Cooperage Co.*, Mo.App., 208 S.W. 122; *Sperry v. Hurd*, 267 Mo. 628, 185 S.W. 170; *Dyer v. Tyrrell*, 142 Mo.App. 467, 471, 127 S.W. 114; *Palmer v. Shenkel*, 50

Mo.App. 571; *McNeeley v. Hunton*, 30 Mo. 332; *Page v. Freeman*, 19 Mo. 421; *Wetzell v. Waters*, 18 Mo. 396; *Canifax v. Chapman*, 7 Mo. 175.

Curlee, 233 S.W.2d at 753 (emphasis added).

Curlee further court noted that “all who direct the commission of a trespass, or *wrongfully contribute to its commission*, * * * are equally liable to the injured person;” (italics ours), and this same language is repeated in *Robinson v. Moark-Nemo Consolidated Mining Co.*, 178 Mo.App. 531, 163 S.W. 885.” *Id.*

Relators attempt to distinguish *Robinson v. Moark-Nemo Consol. Min. Co.*, 163 S.W. 885 (Mo. App. 1914), by claiming that the individuals held responsible were “managers” and that they were controlling the operations of the corporate tortfeasor. But again, the holding of *Robinson* predicates liability on the basis of aiding and abetting, not control. For *Robinson*, control is one way of showing that a corporate officer “contributed to the commission” of the tort.

This [status as a manager] is sufficient to show that they were assenting, countenancing, and, by their inaction, approving, the trespass, which under the law of this state is sufficient to hold them as principals for the tort committed. It was said in the case of *McNeeley v. Huntoon*, 30 Mo. 332, 334: “This instruction erroneously assumes that the defendant could not be a trespasser without an actual participation in the act of seizing and removing the property from the owner's possession. It is hardly necessary to say that such is not the law, and that he who directs or assents to a

trespass is liable equally with him who does the act which constitutes the trespass....” In the case of *Copper v. Johnson*, 81 Mo. 483, it is held that **any person** who is present at the commission of a trespass, encouraging or inciting the same by words, gestures, looks, or signs, or ***who, in any way, or by any means, countenances or approves the same, is, in law, deemed to be an aider and abettor, and stable as a principal.***

Id. at 887-888 (emphasis added).

Darling & Co. v. Fry, 24 S.W.2d 722, 724 (Mo. App. 1930) explains: “[I]t seems that the true basis of liability should be the violation by the officer or servant of some duty owed to the third person by reason whereof injury results to such third person.” Thus, the inquiry as to whether the Plaintiffs pleaded themselves into court necessarily revolves around whether Plaintiffs pleaded that the corporation and Kaiser owed a duty to the Plaintiffs and to those in the Class Geographic Area.

As previously shown trespass, strict/absolute liability and nuisance are all liability-without-fault torts. Under these torts, liability exists apart from the need to show a duty – the duty exists and liability attaches in the presence of injury. See, Keeton, et al, PROSSER AND KEETON ON TORTS (5th ed.) § 75 (Strict liability, as its name implies, means “liability that is imposed on an actor *apart from ... breach of a duty* to exercise reasonable care....”).

As the Chief Operating Officer of Doe Run Resources, did Kaiser have a duty to Plaintiffs and those within the Class Geographic Area to abate the pleaded ultrahazardous

activity that lead to the pleaded nuisance, trespass, strict liability tort and/or negligence per se tort? Plaintiffs have pleaded that injury and the fact that the law imposes liability apart from the need to show a duty. Because the law assumes the existence of the duty, if Mr. Kaiser had knowledge of and participated in decision that led (no pun intended) Doe Run to commit acts for which the corporation is strictly liable, Mr. Kaiser is likewise strictly liable.

Yet the allegations (assumed as true for purposes of this motion) show that Kaiser had a much larger role, and was much more than a simple cog in a larger machine. Defendants failed to abate nuisances and enable pollution control technologies that would have reduced or eliminated the poisons deposited on the plaintiffs' lands. (Pl. Pet. at ¶ 33, 34). The pollution control technologies that were available and that would have abated the nuisances at issue in this lawsuit, were expensive and threatened corporate profits.

What is a Chief Financial Officer? Plaintiffs have been allowed no discovery to determine Kaiser's exact role. Nevertheless, generally speaking, a Chief Financial Officer is charged with the control over and management of the entire financial operation of a company. This is what public sources say about the CFO position in a modern corporation.

- "Clients want a CFO candidate to have a full range of technical skills – the control treasury risk management, investor relations, plus the strategic skills to be a full

business partner with the CEO. In addition, they also need to be an important thought leader and change agent as part of the entire management team.

Along with the CEO, they need to be able to ask the right questions; they need to know the operation. Gardner, “today’s cfo: are you up to the challenge?”
www.fei.org/mag/exclusives/gardner_1102.cfm. (Appendix A-1-2).

- The CFO “plans and oversees the forecasting and budgeting process....” The Accounting Group, “Services: CFO While You Grow”
<http://teamtag.net/services/cfo/shtml>. (A-3)
- The CFO will “analyze company operations, recommend costs savings opportunities.” **THE WALL STREET JOURNAL**, CFO Career Opportunities Advertisement, November 4, 2003. (A-11)
- The CFO will ... [w]ork with IMG and senior management to ensure that the firm is properly capitalized, budgets are developed, monitored and updated as appropriate....” Bank One Job Title: Chief Financial Officer
www.jobsinthemoney.com/html/jobs/103998.htm. (A-5)
- “[T]he actual process of allocating capital should be the province of the CFO.... The CEO, CFO and other key executives, working as a team, should examine each element of the organization’s strategy and each capital investment to anticipate negative outcomes, evaluate overall risk and performance, and take action to ensure that any harm inflicted by a bad idea is limited to a single ‘bump in the

road.’”

www.hfma.org/publications/HFMA_WantsYouToKnow/08273_value.htm. (A-6-7)

- The CFO of the World Resources Institute is responsible for
 - “Institutional Strategy and Planning
 - In collaboration with key staff, designs, implements, and maintains a budgeting process that is realistic and helpful to managing WRI at the program and project levels.

* * *

- Directs development of organization’s long-term financial plans by proactively determining future projections, trends and scenarios that are useful for strategic planning and management of WRI and its programs.” (A-9).

Plaintiffs are convinced that once Kaiser’s job description at Doe Run is produced, it will show a similar pattern of overall budgetary and planning control.

Kaiser was not a junior bookkeeper who wrote checks – **he was the Chief Financial Officer of Doe Run.** (Tab 8, Pl. Pet. at ¶ 34). Discovery will likely reveal that he set (or actively participated in setting) the budgets for every division of the company, including the offending smelter. The funds he authorized for half-steps and ineffective (if inexpensive) technologies were in large measure responsible for the

pollution damage continuing unabated over the time at issue in the petition. More importantly, he did not authorize purchases (or budgets) that would have implemented effective pollution controls. (Tab 8, Pl. Pet. at ¶ 34).

Plaintiffs aver that Kaiser personally participated in these actions – thereby actively participating in the tortious conduct – in spite of knowing that Doe Run was mining a substance that had been associated with personal injury and nuisance damages for decades, and in spite of being involved in setting environmental goals for the Smelter, and the pollution control budget that included the purchase of contaminated properties. (Tab 8, Pl. Pet. at ¶ 34).

As the CFO and person who had ultimate authority to approve budgets that would permit purchases for pollution control devices, Kaiser knew that the Doe Run Smelter was continuing to violate National Ambient Air Monitoring Standards for Lead. (Tab 8, Pl. Pet. at ¶ 34). Kaiser knew about the technologies that were not being used. (Tab 8, Pl. Pet. at ¶ 34). Kaiser knew that the plume from the Doe Run Smelter was emitting toxins into the Class Geographic Area and failed to inform the Plaintiffs. (Tab 8, Pl. Pet. at ¶ 34). As the CFO, the person with the ultimate budget-making and fiscal responsibility, he failed to take actions to eliminate or reduce the releases of the toxic metals. (Tab 8, Pl. Pet. at ¶ 34). He had actual or constructive knowledge of the wrongs being perpetrated by Defendants, and by his direct actions (budgeting) and his indirect actions (approval) participated in them. (Tab 8, Pl. Pet. at ¶ 34). He did so because the expenditure of funds to purchase proper pollution control technology would have placed

his stock prices, and/or stock options on Doe Run (and the options of the other defendants) in jeopardy. (Tab 8, Pl. Pet. at ¶ 33). Purchase of the proper devices would have generated higher costs, lower profits, and affected the bonuses and other remuneration Kaiser received. (Tab 8, Pl. Pet. at ¶ 33). In placing the profits acquired through the failure to procure abatement technologies over the risks to the affected class members, Kaiser personally benefited. (Tab 8, Pl. Pet. at ¶ 33). The only reasonable inference under the pleaded facts is that Kaiser actively participated from his tortious conduct as CFO of Doe Run.

Beyond *Curlee*, which it read with too cramped an eye, the Court of Appeals did not consider liability-without-fault cases in its analysis of the issue whether Plaintiffs had stated a cause of action on the face of the petition. Reading the cases with its improper only-control-gives-liability test, it attempted to distinguish this case from *Constance v. B.B.C. Dev. Co*, 25 S.W.3d 571 (Mo. App. 2000); *Osterberger v. Hites Const. Co*, 559 S.W.2d 221 (Mo. App. 1980); *McKeehan v. Wittels*, 508 S.W.2d 221 (Mo. App. 1980); *Honigmann v. Hunter Group, Inc.*, 733 S.W.2d 799 (Mo. App. 1987); *Grothe v. Helterbrand*, 946 S.W.2d 301 (Mo. App. 1997) and *Boyd v. Wimes*, 664 S.W.2d 596 (Mo. App. 1984).

Constance was a fraud case. The plaintiffs pleaded that the president of the corporation had personal knowledge that statements made by the construction foreman, Kissick (who was an independent contractor) to a buyer about the buildability of real property were false. The Court recited the rule that ‘corporate officers may be held

individually liable for tortious corporate conduct if they have actual or constructive knowledge of, and participated in, an actionable wrong” and concluded that “[I]t is an issue for the jury whether defendant was present at the time of the Kissick tour and statement and aware of the fraud.”

Despite this language, the Court of Appeals wrote that “fraudulent representations to a third party is a breach of a personal duty in and of itself, regardless of whether it is done within the course and scope of employment.” (Slip op. at 9). This statement partakes of the mistaken view of the law held by the Court of Appeals that the corporate officer must have a duty to the plaintiff apart from or in addition to the corporation’s duty before personal liability attaches. The Court of Appeals apparently believed that a co-extensive duty, that is a duty owed by both the corporation and the corporate officer, cannot create liability in a corporate officer.

Plaintiffs here plead a co-extensive duty that exists as a matter of law under trespass, nuisance, strict/absolute liability and negligence per se theories. They do not assert (and do not need to aver) that Kaiser personally did all of the acts necessary to create the nuisance, commit the trespass, complete the strict/absolute liability tort or accomplish the negligence per se act that resulted in injuries to these Plaintiffs and those in the Class Geographic Area. Instead they pleaded (in Counts I-IV) that Kaiser and the corporation had a duty to these plaintiffs as a matter of law and that Kaiser had actual or constructive knowledge of these wrongs and participated in them. As *Curlee* says, “One

who aids, abets assists or advises the trespasser in committing a trespass, is equally as liable as the one who does the act himself.” 233 S.W.2d at 753.

Constance itself draws the proper distinction. “The corporate officer in *Osterberger*¹⁶ argued that he was acting in his corporate capacity. The court found, however, that he had actual knowledge of the fraudulent event and therefore, found that allowing him to be sued in his individual capacity was not erroneous.” 25 S.W.3d at 590.

Further, *Constance* stands for the proposition that mere presence at the time a tort is committed is sufficient to create a jury question regarding personal liability in a corporate officer. The jury must determine whether the corporate officer had both knowledge of and participated in corporate wrongdoing. Where, as here, Plaintiffs plead that Kaiser had both knowledge of and participated in liability-without-fault torts, *Constance* holds that a jury question exists.

McKeehan involves breach of a fiduciary duty owed by a corporation to the plaintiff. The Court of Appeals in this case read *McKeehan* to require a personal duty. “Plaintiffs in this case do not allege Mr. Kaiser had a fiduciary relationship or owed them any other form of personal duty” (Slip op. at 9).

¹⁶ In *Osterberger*, the corporate president personally signed warranty deeds to home purchasers without disclosing his knowledge of the existence of outstanding deeds of trust. The court recited the familiar rule that: “To hold an officer of a corporation liable,

To repeat: The duty owed in this case is different than the duty discussed in **McKeehan**. Here the duty exists under strict/absolute duty, trespass, nuisance, and negligence *per se* torts as pleaded by Plaintiffs. The existence of the duty is created by law and presumed in the presence of injury. To require the Plaintiffs to plead or prove an independent duty would introduce a false issue into the causes of action. See, **Katz v. Blade**, 460 S.W.2d 608, 610 (Mo. 1970)(error to give instruction on defendant's ordinary care in strict liability action because would inject false issue).

McKeehan further notes that

“[C]orporate officers, charged in law with affirmative official responsibility in the management and control of the corporate business, cannot avoid personal liability for wrongs committed by claiming that they did not authorize and direct that which was done in the regular course of that business, ... with such acquiescence on their part as warrants inferring ... consent or approval.”

Quoting William M. Fletcher, Fletcher's Encyclopedia of Private Corporations, Vol. 3, § 1135, p. 708. Here, Plaintiffs plead that Kaiser is the Chief Financial Officer. He is part of the management team of the Doe Run Resources Company. He cannot avoid liability under **McKeehan**.

he must be shown to have had actual or constructive knowledge of the actionable wrong and participated therein.”

Honingmann is a tortious interference with a contract case. The plaintiff sued both the corporation and two of its officers for damages. **Honingmann** holds that corporate officers “are liable if they had knowledge of the corporation’s wrongdoing and participate in its evolution.” 733 S.W.2d at 807 (emphasis added). **Honingmann** thus broadens the type of participation necessary to create liability to include some role in the evolution of commission of the tort.

Grothe was a conversion case. There, the president of the company directed the sale of plaintiff’s silver and placed the funds in the corporation’s account. Because the defendant president of the company was personally involved in the conversion, the court of appeals reversed a directed verdict in the president’s favor. 946 S.W.2d at 304.

The Court of Appeals distinguished **Grothe** because “there is no allegation that Mr. Kaiser personally participated in the discharge of metals or other substance onto the Plaintiffs’ property or that he had any responsibility or authority to control such emissions.” (Slip op. at 10-11). Plaintiffs plead that the corporation had a duty under law to control its emissions and that Kaiser, as the corporation’s Chief Financial Officer, knew of and participated in the conduct of the corporation that led to the torts’ commission. To repeat: They do not need to aver that Kaiser personally did all of the acts necessary to create the nuisance, commit the trespass, complete the strict/absolute liability tort or accomplish the negligence *per se* act that resulted in injuries to these Plaintiffs and those in the Class Geographic Area. Instead they pleaded (in Counts I-IV) that Kaiser and the corporation had a duty to these plaintiffs as a matter of law and that

Kaiser had actual or constructive knowledge of these wrongs and participated in them. “One who aids, abets assists or advises the trespasser in committing a trespass, is equally as liable as the one who does the act himself.” *Curlee*, 233 S.W.2d at 753.

Finally, *Boyd* is a conversion case. Mr. Boyd, the sole statutory trustee and employee of the corporation had responsibility for the operations of the company, even though outside bookkeepers may have committed the error that led to the tort. *Boyd* stands for nothing more remarkable than that personal participation is sufficient participation to extend liability to the corporate officer when the corporation commits a tort.

The Court of Appeals opinion is contrary to *Curlee v. Donaldson*, 233 S.W.2d 746 (Mo. App. 1950); *Constance v. B.B.C. Dev. Co*, 25 S.W.3d 571 (Mo. App. 2000); *Osterberger v. Hites Const. Co*, 559 S.W.2d 221 (Mo. App. 1980); *McKeehan v. Wittels*, 508 S.W.2d 221 (Mo. App. 1980); *Honigmann v. Hunter Group, Inc.*, 733 S.W.2d 799 (Mo. App. 1987); *Grothe v. Helterbrand*, 946 S.W.2d 301 (Mo. App. 1997) and *Boyd v. Wimes*, 664 S.W.2d 596 (Mo. App. 1984).

3. PUBLIC POLICY SUPPORTS THE LIABILITY OF MR. KAISER

As a matter of policy, corporate officers ought to be personally liable if the evidence shows that they knew of and participate in the commission of a corporate tort. Consider the following hypothetical – a hypothetical that Plaintiffs believe will be factual once full discovery in this case is completed. The senior management committee of a company like Doe Run meets to consider its overall operating budget for the following

year. Management, including Mr. Kaiser, is aware that one division of the company is emitting dangerous particulate that promises to pollute surrounding land and injure innocent landowners and their families. The Chief Financial Officer reports that the company will have \$10,000,000 to operate the following year and that all of that money will be used to maintain current operations. When asked, the CFO indicates that some money from other divisions could be shifted to address the pollution problem, but that such an action would create a severe financial hardship for the company and for those divisions. He further recommends against any such shift in the financial resources as the other divisions are more profitable already and the company's ability to obtain borrowed funds for operations will be hurt if those divisions do not remain profitable. A discussion follows that results in a decision to leave the over-all company budget as recommended. The Chief Financial Officer participates in the discussion and agrees with the decision since it follows his financial recommendations. The budget sent to the division committing the pollution does not provide any funds for pollution abatement. By its lack of funding, the budget controls all of the decisions of the officers and managers of the division regarding environmental purchases.

Should the law permit the CFO to escape liability when injury occurs? Under the current precedent, the law will hold officers who participate in corporate wrongs individually liable because they aided and abetted the commission of a trespass, nuisance, strict/absolute liability tort and/or negligence per se tort. The Court of Appeals opinion would permit Mr. Kaiser to escape liability. This Court should not do so.

4. PLAINTIFFS PROPERLY PLEADED THEIR CONSPIRACY CLAIM

Finally, the Court of Appeals concluded that no claim for civil conspiracy was properly pleaded because “the Plaintiffs’ allegations are conclusory.” (Slip op. at 11). At least one court has recognized the inherent difficulty of ferreting out ultimate facts from conclusions of law and from evidentiary facts, particularly at the pleading stage.

The line between ultimate fact and “conclusion of fact or law” is not easily drawn, and some allegations may in one context deemed to be one of ultimate fact while in another, where from a pragmatic viewpoint, some of the words do not give sufficient information to an opponent of the character of the evidence to be introduced or of the issues to be tried, allegations may be deemed to be conclusions of a fact or of law.

Einhaus v. Ames, 547 S.W.2d 821, 824 (Mo. App. 1977).

Similarly, in *DeFino v. Civic Center Corporation*, 718 S.W.2d 505, 511 (Mo. App. 1986), the issue of conclusory pleading arose in a context similar to this one, where Plaintiff was attempting, among other things, to plead a claim for civil conspiracy. The court said:

Defendants attack the pleadings on the ground that it pleads conclusions not facts. However, the nature of plaintiffs' lawsuit is such that they could not specifically allege the facts that are known to defendants and unknown to plaintiffs. Plaintiffs are outsiders to the transactions between defendants

and others and are foreclosed from determining the nature of the alleged transactions until the discovery stage of the lawsuit. While it is true plaintiffs allege legal conclusions when alleging conspiracy, restraint of trade and monopoly these conclusions are also the ultimate facts a court or jury would consider in a claim under Chapter 416. The pleading tracks the language of the statute and informs defendants of the facts and issues to be tried.

Id. at 511.

Indeed, the purported conclusions in the pleadings in this case are the essential and ultimate facts upon which a jury verdict for Plaintiffs will be predicated in this case. Like the plaintiffs in *DeFino*, the plaintiffs are outsiders to the transactions between the defendants and others, and under the *Malone-Mummert* standard the allegations set forth in the petition make out the basis for a reasonable legal opinion that Kaiser is and should be liable. That is all that is required under Missouri law.

Relators spend considerable ink on the argument that “a corporation cannot conspire with its agents.” *Creative Walking v. American States Ins. Co.*, 25 S.W.3d 682, 688 (Mo. App. E.D. 2000). “Plaintiffs allege merely that Mr. Kaiser conspired with Doe Run or other unknown persons within the Doe Run organization to violate the environmental laws. Such a conspiracy is not actionable because there is only one actor – the corporation.” (Rel. Br. at 43)

The argument, however, is not supported by the facts pleaded in the petition. Kaiser and Clark are both employees of Doe Run. Ira L. Rennert is the Chairman of Doe Run. If the conspiracy were limited just to these individuals, *Creative Walking* might have application.¹⁷ However each claim of conspiracy in paragraphs 31 through 39 states that the conspirator was “acting jointly and in conspiracy with the other Defendants and other unnamed co-conspirators.” (Tab 8, Pl. Pet. at ¶¶ 31, 32, 33, 35, and 36) So, for example, the presence of Leslie McCraw, a former president and CEO of Fluor (a defendant herein) could certainly conspire with Kaiser, Rennert, Clark, and the Doe Run Corporation, and his acts in furtherance of the conspiracy can be imputed to Kaiser.

Plaintiffs believe that the holding of the trial court was erroneous on the issue of conspiracy because the Plaintiff did make out an adequate case under the *Malone* standard in that Kaiser was not conspiring solely with the corporation, but individually with its officers and with others like McCraw, who were not Doe Run officers but who sought to benefit through another corporation from keeping the costs down for air cleanup.

¹⁷ . *Creative Walking*, however, is inapposite because while a corporation cannot conspire with its agents, the agents can conspire amongst themselves to use the corporate form to commit tortious acts. If they do so, their individual activities are not shielded. See *Osterberger v. Hites Construction Co.*, 599 S.W.2d 221, 229 (Mo.App.1980). ([T]he corporate office does not insulate against liability one who has actual or constructive knowledge of the actionable wrong and who participates therein.)

D. Conclusion

For the reasons stated, this Court should quash the writ of prohibition previously entered by the Court of Appeals.

II. VENUE IN THE CITY OF ST LOUIS IS PROPER AND NOT PRETENSIVE BECAUSE BY THE FACTS KNOWN TO PLAINTIFFS AT THE TIME THE CASE WAS FILED SUPPORTED A REASONABLE LEGAL OPINION THAT A CASE COULD BE MADE AGAINST MARVIN K. KAISER. FURTHER, THE FACTS SET OUT IN MR. KAISER'S AFFIDAVIT ARE THEMSELVES CONTROVERTED AND PROVIDE NO BASIS FOR A JUDICIAL DETERMINATION THAT JOINDER OF MR. KAISER WAS PRETENSIVE.

A. Standard of Review

As previously noted, *State ex rel. Malone v. Mummert*, 889 S.W.2d 822, 825 (Mo. banc 1985) recognizes two tests to determine whether joinder is pretensive. This Point II addresses only the second *Malone* test. (Point I addressed the first *Malone* test.) The Court Appeals did not consider the second *Malone* test.

Under this second *Malone* test, joinder is pretensive if two elements exist: “[1] the petition does state a cause of action against the [joined] defendant, but the record, pleadings and facts presented in support of a motion asserting pretensive joinder establish that there is, in fact, no cause of action against the [joined] defendant and [2] that the information available at the time the petition was filed would not support a reasonable

legal opinion that a case could be made against the [joined] defendant.” *Id.* “[T]he standard is an objective one, perhaps more appropriately denominated as a ‘realistic belief’ that under the law and the evidence a justiciable claim exists.” *Bottger v. Cheek*, 815 S.W.2d 76, 80 (Mo.App.1991). “The burden rests upon the non-resident defendant moving for dismissal to show the alleged facts are not true and cannot be proven.” *Id.*

Thus, the Defendants must show that Plaintiffs did not have a realistic belief that Mr. Kaiser had constructive or actual knowledge of and participated in the wrongful acts pleaded at the time Plaintiffs filed their Third Amended Petition to prevail on their motion to dismiss and motion to transfer for pretensive joinder. The fact that Plaintiffs’ reasonable belief subsequently proves false is “irrelevant provided the information available at the time of filing was such as to give rise to a reasonable legal opinion that a submissible case could be made against the resident defendant.” *Id.*

Whether a writ should issue is purely a legal question. This is because prohibition considers whether the lower court has jurisdiction to act at all. Review by this Court of a purely legal question is *de novo*. *Blakely v. Blakely*, 83 S.W.3d 537, 540 (Mo. banc 2000).

The trial court’s decision to acknowledge the existence of, but to refuse to rely on the Kaiser affidavit in reaching its decision is a discretionary decision. Review is for abuse of discretion.

B. Information Available to Plaintiffs at the Time the Petition was Filed Supports a Reasonable Legal Opinion that a Case Could be

Made Against Mr. Kaiser.

As noted, *Malone*'s second test contains two parts.

First, *Malone* assumes that the petition states a cause of action but that “facts presented in support of a motion asserting pretensive joinder establish that there is, in fact, no cause of action” and second “that the information available at the time the petition was filed would not support a reasonable legal opinion that a case could be made against the [joined] defendant.” *Id.*, 889 S.W.2d at 825 (emphasis added).

Bottger v. Cheek, 815 S.W.2d 76 (Mo.App.1991), is instructive on the proper procedure and the relative burdens. There plaintiff brought suit against Barnes hospital and others in the City of St. Louis. At some point prior to trial, and after discovery, plaintiff dismissed Barnes Hospital (the sole City defendant). The Defendant then challenged venue as pretensive. The Court focused its analysis on what the plaintiff knew at the time she filed her lawsuit. The Court said:

Assuming the facts alleged in plaintiff's petition are sufficient to state a claim showing plaintiff entitled to recover against the resident defendant, the burden rests upon the non-resident defendant moving for dismissal to show the alleged facts are not true and cannot be proven. This may be accomplished through testimony, affidavits, depositions, interrogatories, requests for admissions, or other evidence. **Plaintiff may counter such proof by coming forward with evidence demonstrating that, at the time the action was commenced, he had reason to believe the facts alleged**

against the resident defendant were true and capable of proof at trial.

The fact this belief is subsequently discovered to be erroneous is irrelevant provided the information available at the time of filing was such as to give rise to a reasonable legal opinion that a submissible case could be made against the resident defendant. Thus, despite the subjective connotation of the term "honest belief" the standard is an objective one, perhaps more appropriately denominated as a "realistic belief" that under the law and the evidence a justiciable claim exists.

Bottger, 815 S.W.2d at 81 (emphasis added).

Where the Plaintiff can “point to a specific fact to support [a] belief that a cause of action existed at the time of filing,” joinder is not pretensive. *State ex rel. Hoeft v. Koehr*, 825 S.W.2d 65, 67 (Mo. App. 1992).

The “facts” to which Malone refers are uncontroverted facts. For this reason, Rule 55.27(a) provides: “If, on motion asserting the defense numbered (6) [failure to state a claim upon which relief can be granted], matters outside the pleadings are presented to and not excluded by the court, the motion presented shall be treated as one for summary judgment and disposed of as provided in Rule 74.04, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 74.04.” Under the Rule, facts become uncontroverted when they are offered to the court and not disputed by the opposing party. Thus, under the second *Malone* test, Plaintiffs may respond to a Rule 55.27(a)(6) motion in two ways:

- I. First, they may show that the facts that form the basis for the affidavit are themselves controverted.
- II. Second, (and this addresses the second element of the second Malone test) Plaintiffs may show that even though the facts submitted to the Court are true, the information available at the time the petition was filed would support a reasonable legal opinion that a case could be made against Mr. Kaiser.

Plaintiffs will address the second part of the second test (II above) first, as it fully disposes of Relators' pretensive joinder claims.

1. DOCUMENTS AND EVIDENCE AVAILABLE TO PLAINTIFFS AT THE TIME OF FILING SHOW THAT PLAINTIFF HAD AN OBJECTIVE BASIS FOR A REASONABLE LEGAL OPINION THAT PLAINTIFFS COULD MAKE A CASE AGAINST MR. KAISER

In response to the affidavits filed by Mr. Kaiser and others in support of the Rule 55.27(a)(6) motion, Plaintiffs filed documents setting out the objective basis for a reasonable legal opinion that Plaintiffs could make a case against Mr. Kaiser. In considering these documents, the Court should understand that the affidavits set out information not known to the Plaintiffs at the time of the filing of the Third Amended Petition. Kaiser's deposition had not been taken. No written discovery on Kaiser's role had occurred. As *Bottger* holds: "The fact this belief is subsequently discovered erroneous is irrelevant provided the information available at the time of the filing was

such as to give rise to a reasonable legal opinion that a submissible case could be made against the resident defendant.” 815 S.W.2d at 81.

(1) Documents Showing General Environmental Conditions

Relators claim that the first ten exhibits submitted to the trial court for consideration on the motion to dismiss are simply publicly available documents that do no more than show that environmental conditions in Herculaneum are bad. (Rel. Br. at 49).

The data contained in the reports referenced in Exhibits 1 – 10 are reported in part by Doe Run. This information helps establish that Kaiser knew of the tortious conduct of the defendant. Certainly the failure to meet environmental goals was well known within the company. Exhibit 7 is a press release from Doe Run that admits that the blood levels of lead in children in Herculaneum exceeded the levels set by the Centers for Disease Control. Certainly Kaiser cannot claim to be ignorant of information. It was published in the St. Louis Post Dispatch, it was made available to the press, and the Department of Natural Resources even posted road signs in the Herculaneum area to alert the general public. (See Ex. 10).

(2) Smelting Division Budget 1994

The Smelting Division Budget for 1994, prepared in 1993 before Kaiser’s tenure, according to Relators, indicates no evidence of Kaiser’s involvement in the setting of expenditures for environmental controls. Yet, Relators freely admit that all Doe Run budgets “contain[] a number of expenditures for environmental control purposes,” and

“set[] goals related to the environment.” (Rel. Br. at 50). Relators then mis-state the test saying “Plaintiff’s offer no evidence in their possession at the time of filing the Third Amended Petition – and there is no such evidence – that Mr. Kaiser’s participation in the budget process involved the establishment of these goals.”

Plaintiffs, at this stage, do not bear the burden of production or the burden of persuasion on the whether Kaiser actually set environmental goals or not. This issue is not what particular spin Doe Run can place on its budget, but rather, whether Plaintiffs possessed sufficient facts to form a reasonable belief as to Kaiser’s liability.

Certainly Kaiser was the Chief Financial Officer. Certainly at the time Plaintiff’s filed the petition, they understood that his role involved complete oversight over the budgeting process. A reasonable construction of the 1994 budget by Plaintiffs at the time the petition was filed would support the implication that Kaiser, who signed off on subsequent budgets, must have been involved in some concrete way in the setting of those environmental goals. (See Section C, *supra*).

(3) Approval of Authorizations for Expenditures

Apparently Relators do not understand how Kaiser may have influenced the implementation of pollution controls. They contend that Kaiser’s signature on the AFEs and the approval of authorizations “does not mean that Mr. Kaiser participated in tortious conduct of the corporation.” (Rel. Br. at 50). Authorization and signature are both acts that constitute active participation.

An analysis of only one of the AFEs demonstrates that Kaiser’s control, through

the budgeting process, of environmental activities, was a significant factor in how and when pollution controls were implemented. Kaiser was plainly aware of the environmental problems at the Doe Run plant. Exhibit 21 (DR 1001117) shows Kaiser approved a project to “greatly improve furnace control and emissions that are currently a significant problem” in November 1994, and set that project for completion in March of 1995. A reasonable construction of the document, as completed, lends the reader to believe that the implementation of the project will occur no later than March 1995. But the AFE signed in November was only to design and cost the system, and did not include funding to implement the design. An additional AFE was required.

In January 1996 Kaiser then approved an AFE to purchase and install a baghouse filter system (Ex. 22, DR101121). The purpose of the project was to improve furnace control and “lower[] emissions that currently are a significant problem.” (Id.) It is at this point that Kaiser’s hand can be seen in the process. The AFE notes that “the following adjustments will be made to the 1996 capital budget to stay within approved guidelines...” and set the project for completion in July 1996, more than a year after the completion date of 1995 proposed in the design phase.

Kaiser’s control over the design and implementation phases, his mandate to stay within “approved guidelines,” and the delay in completion to a different fiscal year would lead a reasonable person to believe that Kaiser, as the Chief Financial Officer, not only authorized, approved and funded environmental projects, but that he affected their completion times and adjusted their funding as required.

It is worth noting that the AFE described above makes alterations to the capital budget. Certainly those alterations and adjustments are not made at low levels in the chain of command, but are executive decisions that must be authorized and approved by Kaiser. An attorney examining these documents could come to the reasonable and realistic conclusion that Kaiser, through wielding control over the purse, was directly responsible in a significant way for the failure of Doe Run to implement pollution controls.

(4) Property Purchases

Relators claim that purchasing property cannot be the basis for a tort (Rel. Br. at 52). Plaintiffs never made such a claim. Rather, since Kaiser is responsible for authorizing and funding such purchases, and by his own admission looks to see that they are properly accounted for, his knowledge and approval of the property purchases would indicate his involvement in and knowledge of the impact of lead pollution on nearby properties. The property purchases do not themselves constitute a tort, they merely reflect Kaiser's ongoing control and active participation in the management and operations of Doe Run.

(5) Cancellation of Expenditures

Exhibit 16 (DR8002042) submitted to the trial court was a computer-generated report showing cancellations of multiple environmental projects. Relators make the disingenuous suggestion that "there is no indication that Mr. Kaiser participated in any decision to cancel any of these projects." (Rel Br. at 52). Mr. Kaiser was the CFO. If

Kaiser, as CFO, instituted the budget and made sure that expenditures were authorized, funded, and appropriately accounted for, it is a reasonable assumption from Exhibit 16 that Kaiser was aware of and actively participated in the cancellation of these environmental projects.

These documents support the reasonable belief of Plaintiffs that Kaiser was actively involved and participated in cancellation of the projects. Kaiser was the CFO with budgetary control second only to that of Jeffrey Zelms. If significant environmental projects were cancelled, it is at least as likely they were cancelled as a result of downward pressure from the financial officers as it is that plebes lower in the Doe Run food chain instituted those cancellations.

And Kaiser's knowledge of the costs of cleanup and Doe Run's precarious financial condition are established in the documents. (See Exhibit 26, St. Louis Post Dispatch, February 15, 2002, where Kaiser stated that the facility was subject to public pressure, was in compliance, and that the economy, not environmental issues, were at fault in Doe Run's financial squeeze.) Taken together the cancellation of expenditures and the knowledge of both the environmental issues and the difficult financial situation of Doe Run establishes, at least in part, a reasonable basis for Plaintiff to believe it could hold Kaiser personally liable. As importantly, Relators do not state unequivocally that Kaiser did not participate in the cancellations, they merely state that "there is no indication..." that he so participated. Plaintiffs see this as a telling turn of phrase.

(6) Construction of a Weather Tower

As mentioned earlier, the Weather Tower was not separately budgeted but was effected through a reduction in assets available to other pollution control endeavors. Again, Relators carefully spin the issue of Kaiser's role by suggesting that "there is nothing in the documents suggesting that it was Mr. Kaiser who decided that it was appropriate to spend \$11,000 out of the \$250,000 paving budget..." Rather than unequivocally denying Kaiser's involvement, they point to the fact that there was no evidence – at the pre-filing stage of this lawsuit – indicating Kaiser made this decision. For plaintiffs' purposes, his authorization and funding of the AFE creates a fact issue from which a reasonable belief as to his liability can be formed.

(7) Baghouse Modifications

Relators claim that the approval of capital expenditures for baghouse improvements is not tortious. They clearly misapprehend Plaintiffs analysis of these facts, and do not substantively address that analysis. The improvements to the baghouse shown in Plaintiff's Exhibit 19 were not budgeted.

What was budgeted was the purchase of additional properties surrounding the plant (creating a pollution buffer zone of sorts). Instead of purchasing properties to enable this buffer zone, Kaiser authorized the transfer of money from this project over to the Sinter Plant so that maintenance could be done without shutting down the plant. A reasonable interpretation of that document is that Kaiser, in authorizing and approving the budgetary changes, was placing corporate profits ahead of pollution control. Were that not true, he simply could have authorized an exception to the budget and

underwritten the expenses out of operations. Instead, he sought to feather his own nest by bringing this production-related improvement on line by canceling property purchases. Again, a reasonable analysis of this document in the context of the case would suggest that Plaintiffs had a reasonable and realistic belief that Kaiser bore personal responsibility for the harms they endured.

(8) Soil Replacements

Kaiser has affirmatively stated that he had no role in deciding what soil replacement activities to engage in. Exhibits 20 and 21, however, show that some budgetary trade off occurred. On the basis of the record before the plaintiffs at the time the lawsuit was filed, a reasonable inference from the document was that Kaiser, as CFO, had participated.

Plaintiffs note, however, with respect to the issue of Kaisers knowledge and participation in budgeting and pollution control set out earlier, where Kaiser definitely did not participate in a decision, (as opposed to where there is simply no evidence of his participation) Kaiser so stated in his affidavit and Relators make note of that fact. Specific denials in the context of this project give credence to the position of Plaintiffs that Relators statements that there was “no evidence” or “no indication” of Kaiser’s involvement in other projects are not, in fact, denials. They are merely characterizations of what Relators believe are the facts.

(9) Delays in Venting Procedure

As noted earlier, one reasonable construction of the AFE documents is that the

design and installation of the venting system would occur in 1995, and that the project was delayed until 1996 because of budgetary considerations. While the explanation proffered by the defendants is credible, it does not undermine in any real sense Plaintiffs' reasonable beliefs at the time of filing that Kaiser was liable and that his liability could be proved.

(10) Blast Furnace Air Control System

Relators again suggest that the documents relating to the installation of an air control system on a blast furnace mean something other than what Plaintiffs interpreted them to mean at the time the lawsuit was filed. This is frequently the case in litigation, and only through depositions and discovery are the true meanings of such documents discovered. At issue is not whether Plaintiffs assumptions from the document were true and accurate, but rather, whether they were reasonable under the set of facts then before them. Plaintiffs understood from the plain language of the document (Ex. 23, DR 1001178) that the implementation of the air control system affected emissions. The implementation of this technology on one, but not both furnaces caused Plaintiffs to believe that financial rather than environmental issues were foremost in the approval process, and Kaiser was the number two person in the approval process.

Relators again note that there is "nothing in the documents" that supports a claim of Kaiser's expertise in the area. Kaiser did not deny, however, that he participated in this decision, and Plaintiffs believed that it was his fiscal expertise, not his engineering expertise, that was at issue. These reasonable beliefs from the document supported

Plaintiffs' basis for Kaiser's personal liability.

(11) Financial Assurance Documents

Relators again misconstrue the import of the Financial Assurance Documents submitted to the state. These documents are not evidence of a tort, per se, (although it is Plaintiffs' belief that there are misrepresentations in them). Rather, they are evidence of Kaiser's knowledge, involvement, and management of the overall pollution control affairs of the company. Kaiser cannot, on one hand, claim he has no knowledge and expertise in the area of pollution control technologies, and on the other make representations that Doe Run has sufficient resources to meet environmental goals. Either Kaiser has such expertise, or he does not. His representation, to the state, that Doe Run has sufficient resources to effect a lead clean up must be taken for an admission of his knowledge and financial understanding of the scope, gravity, and financial implications of the lead pollution.

(12) Financing Lead Clean Up Obligations

Relators claim that Exhibit 28 submitted to the trial court, a memorandum regarding a meeting on Herculaneum soil cleanups, does not show Kaiser's environmental involvement, and cite a supplemental affidavit by Kaiser where he states that "this entry does not reflect any environmental decision-making" on his part. (Rel. Br. at 57).

Kaiser's role is admittedly that of chief financial officer. As such he doesn't make engineering decisions, he makes financial decisions. Without the funding to implement

the engineering decisions, engineering decisions have no import. Kaiser's affidavit indicates he did not have "environmental decision-making" powers, but does not refute that he actively participated in, and was directly involved in the process. Plaintiffs do not claim that the memorandum reflects his "environmental" decision-making. They claim it reflects his fiscal decision-making power, and that this power trumps and has trumped the environmental decision-making at the plant since his tenure began in 1994.

The analysis of this memorandum as showing Kaiser's role in funding (or not funding) environmental decisions was reasonable and contributed to the Plaintiffs legal opinion.

(13) Receipt of a Magazine Article

As candidly admitted by Relators, Kaiser received the magazine article relating to the lead reduction. The issue is not what people in the lunch room knew (the clever approach taken by Relators in spinning the relevance article in the context of plaintiffs' allegations), but rather, what Kaiser knew. Clearly he knew of the environmental problems at Doe Run.

(14) Additional AFEs

The AFEs contested by the Relators (exhibits 30, 31, and 32) all show Kaiser's ongoing participation in and knowledge of the pollution control issues at Doe Run. A reasonable construction of those documents by plaintiffs supports a claim of personal liability against him because his involvement in the process is aptly documented therein.

(15) Newspaper Interview

Relators challenge the St. Louis Post Dispatch interview as one that “does not tend to prove any of the allegations of wrongdoing.” (Rel. Br. at 58). Again, Relators miss the mark. The issue is not one of proof, but of reasonable belief under the facts and circumstances existing at the time the lawsuit was filed. In this regard, the interview shows that Doe Run was having financial difficulties. Kaiser made representations to the people of Herculaneum, among others, that Doe Run was committed to its course regarding the environment. If Kaiser was not actively involved in, and directly participating in the environmental programs and projects, he would not have been in a position to make those statements.

Plaintiffs could reasonably believe that Kaiser, as he represented himself to the public, was knowledgeable of the pollution issues, and was involved in their remediation. These reasonable beliefs, when merged with the other information available at the time, underscore that at the time the lawsuit was filed, Plaintiffs had a reasonable belief as to Kaiser’s liability.

In sum, a comprehensive review of the documents submitted by Plaintiffs in rebuttal to the Kaiser affidavits establishes that “the information available at the time of filing was such as to give rise to a reasonable legal opinion that a submissible case could be made against the resident defendant.” *Bottger*, 815 S.W.2d at 80.

Under *Malone*, uncontroverted facts may defeat a Plaintiffs’ venue choice only where those facts were known to the Plaintiffs at the time they filed their petition. 889

S.W.2d at 825.

Affidavits that suggest a state of the facts determined after the petition was on file, and which do no more than controvert the facts pleaded in the petition, do not shine a helpful light on the analysis of what Plaintiff knew at the time the case was filed. Where the Plaintiffs can point to specific facts that support their belief that a cause of action existed against Mr. Kaiser at the time of the filing of the Third Amended Petition, joinder is not pretensive. *Hoeft*, 825 S.W.2d at 67. And this is so even if subsequent developments show that the Plaintiffs' belief was not correct. "[P]rovided the information available at the time of filing was such as to give rise to a reasonable legal opinion that a submissible case could be made against the resident defendant" joinder was proper. *Bottger*, 815 S.W.2d at 80.

In sum, there are several important flaws in the affidavits filed by Relators. For purposes of the pretensive joinder analysis, among the most important flaws is the date of the affidavits – they post-date the filing of the Third Amended Petition. They recite facts that were within the personal knowledge of the Defendants at the time the action was filed. They do not recite facts that were known to or could have been known by the Plaintiffs at the time the action was filed. Nor does the argument of the Relators claim that these were facts that Plaintiffs knew or should have known when Plaintiffs filed the Third Amended Petition. These failures are fatal to Relator's pretensive joinder claim. The trial court realized this flaw and, quite properly, did not consider the substance of the

affidavits in determining whether Kaiser's joinder was pretensive.¹⁸

Relators have failed to meet their burden because the documentary evidence available to plaintiffs establishes a good faith basis prior to and at the time of filing that a case could be made against Mr. Kaiser.

C. The Facts that Form the Basis for the Kaiser Affidavit were Controverted before the Trial Court.

(This section discusses the first element of the second *Malone* test – when the petition states a cause of action on its face against the joined defendant but the record, facts and pleadings establish that there is no cause of action.)

As previously discussed, the facts to which *Malone* refers in the first element of the second test are uncontroverted facts. This is made clear by the reference to Rule 74.04 in Rule 55.27. If summary judgment can be granted only when there is not dispute as to material facts, a motion to dismiss for failure to state a claim cannot be sustained on a lesser standard.

It is also made clear in the cases. In *State ex rel. Shelton v. Mummert*, 879

¹⁸ The trial court acknowledged Mr. Kaiser's affidavit but did not rely on it in reaching its decision. The most that can be said about the trial court's consideration of the affidavit is that the trial court acknowledged that the affidavit contradicted Plaintiffs' factual allegations. (See, Exhibit 1, p. 6).

S.W.2d 525 (Mo. banc 1994), this Court evaluated the claim that joinder was pretensive based on clearly articulated case law. *Shelton* said:

In analyzing this case under the second test, Shelton contends that the information available to the Nugents at the time they filed their petition did not support a reasonable legal opinion that a present cause of action existed against American Family. [citations omitted] Specifically, Shelton argues that the Nugents' insurance policy and the court of appeals' opinion in *State ex rel. Sago v. O'Brien*, 827 S.W.2d 754 (Mo.App.1992), require that an insured exhaust all applicable policy limits by settlement or obtain a judgment in excess of all applicable liability coverage before American Family is liable under their underinsured motorist provision. Shelton is correct.

Shelton, 879 S.W.2d at 527

In *Shelton*, this Court recognized that the information that demonstrated the absence of a justiciable claim (the holding in *State ex rel. Sago v. O'Brien*, 827 S.W.2d 754) was known to and available to the plaintiffs for seven months before they filed the action. *Shelton*, 879 S.W.2d at 527. Importantly, the information that demonstrated the absence of a justiciable claim was information openly available and readily known by attorneys in Missouri prior to the filing of the petition in *Shelton*.

Similarly, in *State ex rel. Toastmaster v. Mummert*, 857 S.W.2d 869 (Mo. App. E.D. 1993), the defendants raised the issue of pretensive joinder claiming that the

language of the insurance policy sued upon would not have supported a reasonable belief that a cause of action could have been made. The Court of Appeals analyzed the plain language of the policy, which was available to plaintiffs before they filed their lawsuit, and said:

[W]e hold that the exclusion clause in American Family's policy clearly and unambiguously excludes coverage for an off-road accident involving a forklift. There is no dispute that Plaintiff was aware of the exclusion at the time of filing. Thus, we find that Plaintiff did not have a realistic belief that a justiciable claim existed against American Family at the time of filing.

Toastmaster, 857 S.W.2d at 872.

In *State ex rel. Kyger v. Koehr*, 831 S.W.2d 953, 955, (Mo. App. E.D. 1992), plaintiff sued Boykins, an employee of Dierbergs who lived in the City of St. Louis, and Dierbergs, in the City of St. Louis for injuries suffered when Plaintiff slipped and fell at a Dierberg's store in St. Louis County. Boykins filed a motion to dismiss, attaching an affidavit claiming that he had not been on duty at the time of the slip and fall. Plaintiff did not controvert the affidavit.

The Court of Appeals concluded that neither the petition nor anything in the record could be read to assert "that Boykins had complete and exclusive control over the premises or that he was responsible for the condition which caused the injury." *Id.* at 956.

[T]he burden of proof rests upon Dierbergs and Boykin, the parties moving

for dismissal, to show the alleged facts are not true and cannot be proven. This may be achieved by using testimony, affidavits, depositions, interrogatories, requests for admissions, or other evidence.... Relator [plaintiff] may counter such proof by coming forward with evidence demonstrating that, at the time the action was commenced, she had reason to believe the facts alleged against the resident defendant, Boykin, were true and capable of proof at trial.

The absence of a controverting affidavit made the fact of Boykins' lack of control or duty an uncontroverted fact for purposes of the pretensive joinder issue.

In *State ex rel. Ford Motor Co. v. Bacon*, 63 S.W.3d 641, 644 (Mo. banc 2002), this Court considered an affidavit of an employee of Ford Motor Credit on a pretensive joinder question. The affidavit stated that Ford Motor Credit did not act as an agent for Ford Motor Company. Unlike this case, where the claim is that Kaiser is a joint tortfeasor and a co-conspiracy, the issue in *Bacon* was the agency question addressed in the affidavit. Plaintiffs did not controvert the affidavit. In the absence of any claim that Ford Motor Credit itself committed a tort, the lack of agency was decided on the uncontroverted affidavit.¹⁹

¹⁹. Chief Justice White's dissent, joined by Judge Woolf, suggested one to view skeptically a self-serving affidavit from a defendant: "Ford offered just two brief affidavits that would have to be described as self-serving, if they were not so

In each of these cases, the facts upon which the court relied to conclude that no cause of action existed were not contested by the Plaintiff. Here, the documents provided by the Plaintiffs as described at pp 54 - 64, *supra*, contest Kaiser's factual claims.

D. Even If The Affidavits Are Considered, They Are Self-Serving, Contradictory, Conclusory, and Failed To Meet The Burdens of Production And Persuasion To Show A Lack of Reasonable Belief

The affidavit filed by Kaiser is, of course, an affidavit given with a purpose – to support Relator's claim of pretensive joinder. (Exhibit 9, ¶ 7(b)). Aside from the fact that Plaintiffs had no way of knowing these facts when they filed the Third Amended Petition, the careful words of the affidavits crafted by Mr. Kaiser's lawyers have not been tested by cross examination, nor has there been any discovery permitted on the issue of Mr. Kaiser's responsibilities. The affidavits also contain legal conclusions. But even more important, the documents filed by the Plaintiffs and the reasonable inferences that flow from those documents controvert the "factual" recitations in the affidavits.

Kaiser's affidavit states, *inter alia*:

3. I have never provided judgments about whether any *particular*

incomplete." *State ex rel. Ford Motor Co. v. Bacon*, 63 S.W.3d 641, 645(Mo. banc 2002) (White, J., dissenting).

environmental expenditure should or should not be made.”

(Exhibit 9-J)(Emphasis added).

This is clever. It allows Mr. Kaiser to say that he was not involved in a particular expenditure, but does not deny his over-all authority to set budgets for the company that would, by the poverty of the allocation, make a particular expenditure impossible. This is participation in the corporation’s wrongful acts.

Mr. Kaiser’s also says:

2. I defer to these corporate officers and employees having direct responsibility for Doe Run’s environmental function on all decisions *about* budgeting and determining *the level of expenditures to control emissions from the Doe Run Herculaneum Smelter....*”

Id. Again, Mr. Kaiser attempts to hide the general within the specific, failing to discuss his over-all role in budgeting for the entire company.

The attempt to obfuscate continues:

5.(c) I have not and do not set environmental goals for the Herculaneum smelter The budgeting process to set specific environmental goals for the Herculaneum Smelter ... are carried out by those corporate officers and employees of Doe Run with environmental responsibilities.

Again, Mr. Kaiser’s overall control over the financial affairs of the company is not discussed.

There are also inconsistencies in the affidavit. On the one hand, Relators claim that Kaiser's involvement was restricted to budgeting, and on the other, Kaiser claims:

3. In my capacity as Chief Financial Officer, I am one of six corporate managers or officers, who must each sign Authorization for Expenditures for approval of expenditures made by Doe Run. My role in this process is ensuring the expenditures are properly authorized, funded, and accounted for. I have never provided judgment about whether any particular environmental expenditure should or should not be made. I have never refused to approve an Authorization for Expenditure on an environmental project.

(Exhibit 9-J). Kaiser claims his role is making sure that expenditures are "authorized." At some point Kaiser must view the authorization for the expenditure and judge that authorization under some criteria. And although Kaiser claims that he has not provided judgment about whether an expenditure should be made, he has obviously provided judgment about how those expenditures are authorized and funded. His actions in this regard demonstrate the inherent falsity of his affidavit.

Kaiser could certainly approve a purchase, but still participate in the decision not to fund it, as his behavior in the Weather Tower project amply demonstrates.

On January 8, 1997, Kaiser approved a project which was described as "Install new weather tower...Both the State of Missouri and Region VII EPA has determined that a new weather tower located east of the plant was required to develop a new Lead SIP for

Herculaneum.” The SIP is the state required pollution control plan required for the plant to operate. The “Purpose” section of the AFE signed by Kaiser notes “11,000 will be deleted from the money budget for plant paving.”

In December 1996, only a month before the weather tower project, Kaiser had approved an expenditure for installation of concrete and asphalt to “assist control of lead dust emissions.”

Kaiser engaged in a trade off, approving the budget for one pollution control project (the paving) and then deleting a large amount of this budget to pay for the Weather Tower (a different pollution control project). Thus Kaiser’s self-serving statement that he had never failed to *approve* an environmental project, while perhaps factually correct in the abstract, is without credibility when viewed in the context of the funding of those projects, which Kaiser also controlled.

The affidavits are also interesting from a strictly semantic point of view. Relators state at several points that Mr. Kaiser had no involvement in the “establishment” of the goals. (Rel. Br. at 50). Relators claim that Kaiser had no “role in setting environmental goals,” is at odds with the statement made by Kaiser with respect to what his role as CFO requires. Kaiser plainly admits that his role is to ensure that “expenditures are properly authorized, funded, and accounted for.” (Affidavit of Kaiser at ¶ 3).

As the CFO, with budgetary control over the purse strings of the organization, Kaiser must make some determination that the expenditure is “properly authorized.” In other words, if a person subordinate in the chain of command to Kaiser sets an

environmental goal that conflicts with Kaiser's budget and requires more funding than Kaiser budgeted, Kaiser can truthfully state that he has no role in setting the goal, but omit that he has the authority to approve that goal, to properly authorize it, and to fund it. Therefore, it seems, Kaiser can withhold authority to approve such an environmental goal, require someone lower in the chain of command to set a different goal, and thereby indirectly set those environmental goals. This is precisely what is alleged (or is a reasonable intendment from the allegations) in the petition.

Our system determines truth by trial, not unchallenged affidavit. It is called a "trial" for, among other reasons, the requirement that a witness go through the intense scrutiny that only cross-examination can provide. The documents described show that the careful wording chosen for Mr. Kaiser by his counsel will be subject to a different meaning when cleansed of their self-serving nature with the disinfectant of cross-examination. In sum, the Kaiser "facts" are too late for consideration when pretensive joinder is at issue and too sufficiently controverted by the Plaintiffs' documents to permit the Court to conclude that the trial court did not have authority to conclude that venue was not pretensive.

E. For Purposes of Determining Pretensive Joinder Issues, the Prior History of this Case Cannot Be Considered

Relators claim that Plaintiffs are not entitled to the deferential standard of review and to the benefit of their reasonable beliefs because there was prior litigation between the parties.

The prior litigation between the parties was dismissed. A new lawsuit is on file. While some of the documents submitted in this litigation are documents obtained in the earlier case, that case is over. Those documents may be considered in determining what Plaintiffs' knew when they filed their Third Amended Petition, but the prior filings are of no moment under the *Malone* tests.

The specific allegations of wrongdoing against Kaiser and Zelms have not been the subject of discovery. Kaiser submitted an affidavit because his deposition had not been taken in any earlier proceeding or case.

The prior litigation should be ignored for purposes of deciding the issue of pretensive joinder now before the Court.

F. Public Policy Does Not Support Transfer of Venue

For similar reasons, the policy rationales advanced by Relators (Rel. Br. at 60) should be disregarded because they depend, for their vitality, on the prior filed case between different parties. Venue is a determination made on a case-by-case, fact-by-fact basis. The prior litigation simply has no rational application in deciding these issues.

With respect to the other policy rationales offered, specifically that subjecting a corporate officer to "ruinous personal liability" on the basis of his residence, the Relators' argument ignores the fact that Plaintiffs sued Kaiser because of the wrongs in which he participated, not because he lives in the City of St. Louis. Kaiser is a proper party. The venue statutes permit Kaiser to be sued where he lives.

Relators policy argument that suit against the corporation should not be allowed where a corporate officer lives simply because the officer lives there also misses the mark. Venue is proper in this case because there are both individual and corporate defendants, and the case can be brought in any county (in this case, St. Louis City) where any of the individual defendants resides. It is undisputed that Kaiser lives in St. Louis City.

Venue predicated on residence of the defendants is an articulation of the public policy of this state made by the legislature. § 508.010 RSMo (2002). Courts should not re-write or amend statutes to substitute their view of public policy. *Bollinger v. Bollinger*, 778 S.W.2d 15 (Mo. App. 1989); *State ex rel. DeGeere v. Applequist*, 748 S.W.2d 855, 859 (Mo. App. 1988).

G. Conclusion

For the reasons expressed, the Writ of Prohibition made absolute by the Court of Appeals, Eastern District, should be quashed.

CONCLUSION

In Point I, Plaintiffs established that the claims asserted against Kaiser met or surpassed the deferential standard of review for a motion to transfer venue. In Point II, Plaintiffs established that "the information available at the time of filing was such as to give rise to a reasonable legal opinion that a submissible case could be made against the resident defendant." *Bottger*, 815 S.W.2d at 80.

Relators failed in their burden of production and in their burden of persuasion on the relevant issues. A writ of prohibition does not issue as a matter of right. *Derfelt v. Yokum*, 692 S.W.2d 300, 301 (Mo. banc 1985); *State ex rel. Hannah v. Seier*, 654 S.W.2d 894, 895 (Mo. banc 1983) Whether a writ should issue in a particular case is within the discretion of the court. *Derfelt*, 692 S.W.2d at 301

The essential function of prohibition is to correct or prevent inferior courts and agencies from acting without or in excess of their jurisdiction. *State ex rel Douglas Toyota III, Inc., v. Keeter*, 804 S.W.2d 750, 751 (Mo. banc 1991); *State ex rel. McDonnell Douglas Corp. v. Gaertner*, 601 S.W.2d 295, 296 (Mo.App.1980). Prohibition cannot be used as a substitute for an appeal. *State ex rel. Boll v. Weinstein*, 295 S.W.2d 62, 67 (Mo. banc 1956). Prohibition is not intended as a substitute for correction of alleged or anticipated judicial errors and it cannot be used to adjudicate grievances that may be adequately redressed in the ordinary course of judicial proceedings. *Knisley v. State*, 448 S.W.2d 890, 892 (Mo.1970).

Bottger v. Cheek, 815 S.W.2d 76 (Mo. App. E.D. 1991) clearly establishes that pretensive joinder is an issue that can be resolved on appeal. As such, a writ should not lie.

More importantly, this Court ought not substitute its judgment or discretion for that of another court properly vested with jurisdiction and exercising its discretion within the legitimate boundaries of that jurisdiction. *State ex rel Douglas Toyota III*, 804 S.W.2d at 751. For all these reasons, the writ previously issued by the Missouri Court of

Appeals should be quashed.

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

Undersigned counsel hereby certifies that this brief complies with the requirements of Rule 84.06(b) in that it contains 20,068 words. Disks were prepared using Norton Anti-Virus and were scanned and certified as virus free.

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